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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

Robert A. Mercer, Jr. *Petitioner*

v.

Jason Monzack, Esquire

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

Robert A. Mercer, Jr.
Pro se
P.O. Box 6791
Providence, RI 02940
(401) 942-2167

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61 pp

The following questions presented for review to this court orginate from a chapter seven bankruptcy case on appeal and the questions for review are relative to a first circuit decision in this case that for the first time at the appellate level allows adjudication of the merit of debtor exemptions ultimately denying those exemptions by expressly waiving in a nearly absolute sense the hitherto strict requirements under bankruptcy rule 4003(b) to object to the exempt claim (no rule 4003(b) objection made this case) by a party in interest within the thirty day period. It is uncontested appellee (trustee) made no such objection and the first circuit affirmed the lower court's view that no such objection need have been made despite Supreme Court precedent to the contrary in Taylor v. Freeland & Kronz, 112 S.Ct. 1644 (1992).

I. Which circuit is correct in their interpretation of Taylor v. Freeland & Kronz, 112 S.Ct. 1644 (1992) - the seventh circuit In the Matter of Kazi, 98 F. 2d 318, 320 (7th cir. 1993) as confirmed recently by seventh circuit again in Matter of Salzar, 52 F. 3d. 708, 711-712 (7th cir. 1995) proscribing ***any*** adjudication on the merit of exemptions for any reason when there is a failure of a party in interest to make a rule 4003(b) objection within the time allowed or the first circuit in the instant case in Mercer v. Monzack, 53 F.3d 1 (1st Cir. 1995) whereby such failure is generally excused for all colorable basis (facially valid) exempt claims and where the referenced asset is an unallocated sum?

II. Is the first circuit's interpretation in the instant case correct of Taylor, Id. that colorable basis exempt claims need not be objected to under bankruptcy rule 4003(b) since in Taylor the exempt claim was

considered non-colorable basis? Does not 11 USC 522(l) protect ***all*** exempt claims where there is a rule 4003(b) failure to object?

III. Are the focus of the objection provisions, as the lower courts and appellee the instant case maintain, of Bankruptcy Rule 4003(b) simply a rote comparison to see if they exist in the US Code - "...initially claimed exemption was valid on its face, and thus no objection was required." Mercer v. Monzack, 53 F.3d 1, 3 (1st Cir. 1995) - or are the same objection provisions, as appellant maintains, intended to focus on the perceived merit of the listed exemptions?

IV. Did the First Circuit in Mercer v. Monzack, 53 F.3d 1 (1st Cir. 1995) have jurisdiction to adjudicate on the merits of exemptions when there is an uncontested failure of a party in interest to make a bankruptcy rule 4003(b) objection within the time allowed where the proffered legitimate purpose of such seemingly time-barred adjudication is to determine the proper allocation of an unallocated settlement fund claimed entirely exempt - the courts rationale being if debtor's exemptions for permanent disability or loss of future earnings can be disproved that such disproof nullifies the intent of the unallocated settlement fund for those purposes debtor thereby then referencing, in the first circuit's view, as 100% exempt ***funds allegedly not part of the bankruptcy estate*** (despite debtor/appellant's amended B-3 and B-4 bankruptcy schedules unmistakably directly referencing the insurance settlement as 100% exempt)?

V. Did the First Circuit in Mercer v. Monzack, 53 F.3d 1 (1st Cir. 1995) have jurisdiction to adjudicate on the

merits of exemptions when there is an uncontested failure of a party in interest to make a bankruptcy rule 4003(b) objection within the time allowed whether or not the proffered legitimate purpose of such seemingly time-barred adjudi - cation is that the exempt claim is, unlike in Taylor v. Freeland & Kronz, 112 S.Ct. 1644 (1992), ostensibly a colorable basis?

VI. Irrespective of whether 11 USC 522(l) relegates as moot any discussion of colorable versus non-colorable exempt claims in the context of bankruptcy rule 4003(b) in that 11 USC 522(l) protects all exempt claims and makes no differentiation as to colorable or non-colorable basis exempt claims, does not the first circuit's colorable basis (i.e., facially valid) exempt claim argument fail as excusatory justification for failure to make a rule 4003(b) objection and for seemingly proscribed adjudication on merit of exemptions when that adjudication, in ultimately denying the exempt claim, admits to finding no basis (i.e., no merit) for such exempt claim rendering same exempt claim by logical necessity a non-colorable basis exempt claim (which the first circuit agrees is protected exempt property per Taylor)?

A List of Parties to the Proceeding in the Court whose Judgment is Sought to be Reviewed

In accordance with S. Ct. Rule 14 .1.b. as to parties in the proceeding, on 4/25/95 USCA judgment was entered in behalf of appellee Jason Monzack, Esq., 888 Reservoir Ave., Cranston, RI 02920

Other parties served in lower court proceedings all pleadings by certificate of service but who have not to date entered an appearance:

US Trustee's Office
BFOB Rm. 472
10 Causeway Street
Boston, MA 02222

Office of the US Trustee
10 Dorrance Street, Rm. 519
Providence, RI 02903

In addition to the above, party served with copies via certificate of service in proceedings before this court:

Solicitor General
Department of Justice
Washington, D.C. 20530

Counsel of Record for Appellee in USCA as of 8/9/94:

Christopher L. Russo, Esq.
Kirshenbaum & Kirshenbaum
888 Reservoir Avenue
Cranston, RI 02920

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Lower Court Citations This Case

In accordance with Supreme Court Rule 14 .1.d, the following are the lower court citations:

In Re Mercer, 158 B.R. 886 (Bkrtcy D.R.I. 1993)

Mercer v. Monzack, 170 B.R. 759 (D.R.I. 1994)

Mercer v. Monzack, 53 F. 3d. 1 (1st cir. 1995)

Jurisdictional Statement

Pursuant to Supreme Court Rule 14 .1.e.:

(i) Judgment entered in favor of appellee Monzack affirming the District Court decision denying appellant's appeal April 25, 1995.

(ii) Appellant Mercer's petition for rehearing and suggestion for rehearing en banc were denied by order of the court, First Circuit Court of Appeals, entered May 17, 1995. On August 6, 1995 Justice Souter extended the time within which to file the within petition for writ of certiorari to and including October 14, 1995. On October 23rd, 1995 the petition timely filed with this Court was returned to petitioner under S.Ct. Rule 14.5 for correction of errors and is due to be timely docketed by December 21, 1995.

(iv) The statutory provision believed to confer on this court jurisdiction to review the judgment is 28 USC 1254(1).

Statutes and Bankruptcy Rules Involved in this Case, S.Ct. Rule 14 .1.f:

Bankruptcy Rule 4003(b):

"The trustee or any creditor may file objections to the list of property claimed as exempt within thirty days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list unless, within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and the attorney for such person."

Bankruptcy Rule 4003(c):

"In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections."

11 USC 522(l):

"The debtor shall file a list of property that the debtor claims as exempt under subsection(b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt."

11 USC 541(a)(1):

"Section 541. Property of the estate

(a) The commencement of a case under section 301,302, or 303 of this title [11USC section 301, 302, or 303] creates an estate. Such estate is comprised of the following property, wherever located by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case."

In Accordance with S. Ct. Rules 14 .1.g. and .1.g.(ii), Statement of the Case including Basis for Federal Jurisdiction in each Lower Court

In January, 1990, appellant Mercer was injured in an automobile accident. June 19, 1991 while negotiations were still pending for an insurance settlement of that accident, Mercer filed a joint chapter 7 bankruptcy petition with his wife Anne. Mercer listed on bankruptcy schedule B-3 the value of the potential settlement at $15,000. The basis of federal jurisdiction by the bankruptcy court was 11 USC 541(a)(1). Schedule B-4 exemptions were incorrect vis-a-vis 100% exempting the settlement and were corrected on amended petition filed 8/26/91. Mercer sent a letter 7/25/91 to appellee/trustee by certified mail, entered into the appeal record USDC 1/12/94, notifying trustee of intent to 100% exempt entire settlement - trustee acknowledged having received this letter at the 1/12/94 USDC hearing. In this letter, appellant Mercer states: "Regarding your planned objection to any part of my settlement being exempt...." Appellee did not file a rule 4003(b) objection within the thirty day period allowed ending 9/25/91 (nor did trustee ever attempt to belatedly file a rule 4003(b) objection as he has stated that there was nothing to object to as the exemptions stated by debtor are allowed by the bankruptcy code). On Mercer's amended B-3, Mercer valued the potential settlement at $40,000 as offers had increased to that amount based on ongoing medical diagnostic tests that indicated the

seriousness of Mercer's injuries. On Mercer's amended B-4, four exemptions were listed under the critically important heading listed on all B-4 schedules but omitted from each court's retype of Mercer's amended B-4 - "PROPERTY CLAIMED AS EXEMPT" without skipping a line are the words "Possible Personal Injury Settlement " clearly identifying the pending settlement as 100% exempt.

On November 18, 1991, Trustee Monzack sent a letter to debtor's personal injury attorney stating "Pursuant to papers which have been filed in the US Bankruptcy Court, the debtors have exempted a total of $11,250 of their claim. Accordingly, should the recovery ... be in excess of $11,250 , the excess funds would be payable into the bankruptcy estate."

March 6, 1992 trustee filed his "Motion for Turnover and Determination of estate's interest in settlement proceeds of debtor's personal injury claim." March 31, 1992 Mercer received medical documentation that he had become 10% permanently disabled as a result of the auto accident. The hearing would be the equivalent of a Rule 4003(c) hearing - in appellant's 4/10/92 Objection to Turnover Taylor v. Freeland & Kronz, 938 F.2nd 420 (3rd. cir. 1991) was cited, Taylor not decided by this court until 4/21/92 - appellant took the position of asserting that adjudication on merits of exemptions was time barred and that trustee's aggressive push for discovery as to medical records was therefore precluded. On 4/17/92 trustee filed a Motion to Compel Documents, which was granted 5/4/92. Eleven days later on 5/15/92 trustee, while the documents that trustee had requested were on their way in the mail to him, and because he had not yet received them, filed for sanctions as to non-compliance with production of documents. Turnover of the pending settlement was granted as the sanction 5/26/92.

Debtor appealed to USDC, USDC took jurisdiction pursuant to 28 USC 158(a) and the case was remanded to bankruptcy court for a statement of reasons , findings of fact and legal authority, remanded to BK court 9/21/92. USDC pointed out in the remand order the then pending settlement could not be turned over as it was not settled yet. In September 1992 medical tests indicated Mercer's condition was worsening and Mercer sought consideration by the court of a higher settlement amount. An unallocated settlement amount of the originally agreed $50,000 was approved by the bankruptcy court January, 1993. May 20th, 1993 the bankruptcy court granted Mercer's request to be pro se and has been so throughout USDC and USCA to date. The first hearing held bankruptcy court since petition filing on the issue of the Turnover was held mostly off the record in Bankruptcy Judge Votolato's chambers. The $50,000 funds since settlement January, 1993 are in a joint interest bearing account with appellant's former personal injury attorney and appellee Monzack as joint signatories. The account's distribution to creditors is stayed by various stays granted throughout proceedings including the current stay in effect at USCA.

An order was issued 5/27/93 by Bankruptcy Judge Votolato requiring supplementary memorandum from debtor and trustee as to what portion of the settlement should be attributed to disability, personal bodily injury, pain and suffering, compensation for actual pecuniary loss or loss of future earnings. In appellant's memo, appellant aggressively pointed out that the five court designated categories were rendered superfluous by the failure of the trustee to make a rule 4003(b) objection - that whatever debtor claimed exempt, per 11USC 522(l), was exempt and debtor had 100% exempted entire settlement. The bankruptcy court issued its

second judgment this case in its 9/17/93 opinion denying $38,750 of exempted proceeds as estate property. The bankruptcy court opinion, In Re Mercer 158 B.R. 886, 889 (Bkrtcy. D.R.I. 1993) makes irrefutably clear the ***denial of each 100% exemption was merits based.*** The seventh circuit's prohibition against ***any*** adjudication on the merits of debtor exemptions, In the Matter of Kazi, 98 F.2d 318, 320 (7th cir. 1993), was the focal point of appellant's USCA brief and reply brief but was not even mentioned in the First Circuit opinion Mercer v. Monzack, F. 3d 1 (1st cir. 1995). Consequently, the conflict between the first circuit and seventh circuit as to whether or not 11 USC 522(l) precludes adjudication on the merits of exemptions (as such adjudication was not precluded the instant case but was precluded in Kazi, Id.).

Debtor appealed to USDC again 9/23/93, as the bankruptcy court had issued a second judgment while on remand from USDC and USDC took jurisdiction again under 11 USC 158(a). On 1/12/94 appellant terminated wife's involvement in appeal, as her direct interests were minimal and upon motion approved consolidated the two USDC appeals. Based on the 1/12/94 hearing held at USDC, the Magistrate issued his "Report and Recommendation" affirming the bankruptcy court ruling to US Senior District Judge Raymond Pettine 1/24/94, appellant timely filed an objection 2/4/94. In that objection, Mercer states unequivocally that, despite the USCA reference that Mercer does not contest on appeal that he is ruled to be not disabled and that there are no lost earnings (which are references to both of appellant's 100% exempt claims), Mercer v. Monzack, 53 F.3d 1, @3 (1st cir. 1995), in Mercer's 2/4/94 Objection to Magistrate's R&R page 1, "Appellant's Objection is specifically as follows: (1) Footnote #16, 1/25/94 Magistrate's Report, Debtor is not "pressing the

appeal of this issue" as in Debtor's view ***it is secondary to other more compelling issues delineated herein that presently make said allocation superfluous***, (i.e., proceeds are 100% exempt). If the Court continues to ignore the Rule 4003(b) 4003(b) [sic] default and its effect ***Debtor reserves the right to then emphasize the allocation issue.***" On 3/14/94 judgment in favor of appellee affirming BK Court 9/23/93 decision was entered USDC thereby affirming the bankruptcy court denial of appellant 's 100% exemptions based on their alleged lack of merit. Rule 4003(b) was ruled inoperative by both courts in that trustee ostensibly need not have made a rule 4003(b) objection. An appeal was taken 4/4/94 to USCA, 1st cir. The appeal was docketed 4/11/94. Jurisdiction in USCA was conferred for the appeal by 28 USC 158(d). Judgment affirming USDC ruling was rendered by USCA 4/25/95. An order denying rehearing and rehearing en banc was issued by the first circuit 5/17/95. Appellant filed a motion filed to stay mandate 5/23/95. The motion was granted 6/23/95. As periodically renewed, the current stay is effective through 12/21/95. (A sixty day extension to file petition for writ of certiorari was granted by this Court 8/6/95. On 10/27/95 USCA extended the stay until 12/22/95.)

The bankruptcy court found that "... Taylor is clearly distinguishable from the instant case, and therefore not controlling." In Re Mercer 158 B.R. 886, 888 (Bkrtcy. D.R.I. 1993). At the 1/12/94 hearing at USDC before the magistrate, both the magistrate and the trustee concede if Taylor is controlling, appellant prevails. That court, in affirming the bankruptcy court decision, upheld then that Taylor is not controlling. In Mercer v. Monzack, 53 F.3d 1, 3 (1st cir. 1995) ***the appeals court inferentially admits Taylor is controlling but then re-interprets Taylor as not requiring that rule 4003(b) objection need have been made by appellee,*** thereby providing a basis for still disallowing

appellant 100% exemptions all the while the first circuit remaining silent as to the seventh circuits opposite interpretation of Taylor in Kazi's, Ibid., absolute prohibition against any adjudication on merit of exemptions when there is not a timely rule 4003(b) objection made.

Reasons Relied on for Allowance of the Petition for Writ of Certiorari, S. Ct. Rule 14 .1.h.

The reasons relied on for allowance of the writ of certiorari in this case are broader than the clear and apparent conflict between Courts of Appeal in Mercer v. Monzack, 53 F.3d 1 (1st cir. 1995) as delineated below the First Circuit the instant case allows for the first time at the appellate level since Taylor v. Freeland & Kronz, 112 S.Ct. 1644 (1992) adjudication on the merits of exemptions where there is an uncontested failure by the party in interest to make a bankruptcy rule 4003(b) objection in the time allowed. Failure to make a rule 4003(b) objection pursuant to this courts ruling in Taylor, Id. is now excused, precluding 11 USC 522(l) being operative. In the Matter of Kazi, 98 F.2d 318, 320 (7th cir. 1993), see also Matter of Salzar, 52 F.3d. 708, 711-712 (7th cir. 1995), the same adjudication allowed by the First Circuit the instant case is proscribed by the Seventh Circuit. This case, Mercer v. Monzack, 53 F.3d 1 (1st cir. 1995) is not just an isolated example where Rule 4003(b) is rendered nugatory - the case is much broader and important in scope though that in itself would be highly significant in that it would render this case in direct conflict with the Supreme Court precedent of Taylor. More importantly, ***in this case the First Circuit not only attacks the Taylor mandate but challenges the very basis of the necessity for making any rule 4003(b) objection ever.*** Consequently, this case is of such broad scope so as to affect nearly every subsequent chapter seven bankruptcy and, if the First Circuit decision is allowed to stand as new law, will dramatically and irrevocably alter the landscape as to administration in bankruptcy. The manner in which the First Circuit bases their decision to unilaterally change the rules of bankruptcy procedure has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Specifically, the First Circuit's decision in Mercer v. Monzack, 53 F.3d 1 (1st cir. 1995), allows all exempt claims that appear "...facially valid...", Id. 2, (facially valid to be read as valid in nomenclature only, i.e. - exemptions that are nominally correct in that they are allowed by law as they exist in the code irrespective of any merit the exemptions may have or may not have in conjunction with a specific exempt claim) without regard to same exemptions perceived merit to be subsequently denied in what the Kazi case has interpreted Taylor would dictate as a time barred hearing on adjudication of the merits of exemptions (ultimately disallowing what for same rule 4003(b) objection purposes were valid exemptions but for purposes of ultimately allowing same exemptions as to their merits were invalid, i..e. - disallowed on their merits).

The ruling by the court below, in direct contravention of Taylor, allows bankruptcy courts to maintain jurisdiction over property claimed as exempt where there is an uncontested failure by the party in interest to make a bankruptcy rule 4003(b) objection within the time allowed. The ruling for the first time at the appellate level splits apart responsibility of the rule 4003(b) objector from the consequences of a failure to observe, based on bankruptcy petition schedules, what the potential objector might ultimately object to (i.e., the contested property going in its entirety as exempt to debtor) by rendering all cases except those minuscule number of cases where debtor listed exemptions nominally incorrect thereby only in that rare instance requiring a rule 4003(b) objection. This ultimately has the incontrovertible practical effect of nullifying rule 4003(b).

Appellee and the First Circuit would have us buy into their patently specious argumentation that exemptions correctly listed have nothing to object to for purposes of rule

4003(b) (while simultaneously expeditiously ignoring responsibility to look to the proper focus of same objection provisions - perceived merit of exemptions) thereby totally skirting the significant consequential effects of 11 USC 522(l) and then, having effectively subverted 11 USC 522(l), at any later date, in the instant case two years after the 30 day objection period, exerting court jurisdiction to adjudicate on merit of exemptions ultimately denying same exemptions ("The trustee did not object to the debtor's claim of exempt property as the exemptions stated by the debtors ***are allowed by the bankruptcy code***.", appellee brief, USCA, page 6) as being without merit. Thus, while the First Circuit pays lip service to the intent of rule 4003(b) in actuality it is effectively nullifying Rule 4003(b) and 11 USC 522(l). The ruling in the instant case reasserts pre-Taylor bankruptcy administration the right of the bankruptcy court to determine the validity of an exemption without rule 4003(b) objections having to be made.[1]

Having considered the above, the very appropriate question arises 'That type of situation was fully covered in Taylor - it is a Taylor issue and should it not be viewed then as not a novel issue but a decided issue?' At first blush yes, but, what if a lower court were to re-interpret for the first time the purpose of Rule 4003(b) objection provisions to be simply a rudimentary checklist to determine by the party in interest if

[1] Pre-Taylor bankruptcy administration allowed statutory challenge to exemptions despite a failure by party in interest to make a timely Rule 4003(b) objection - in Hansen, (overruled by Taylor, Id.), failure to file a timely objection was construed as an admission of debtor's factual allegations but "...the objector being permitted to challenge whether those facts legally entitle Debtor to claimed exemption;..." In Hansen, 101 B.R. 33,33 (Bkrtcy.N.D.Ind. 1988). With the advent of Taylor, statutory basis became a moot issue in the context of whether debtor would prevail in exempt claim where there was not a timely rule 4003(b) objection because it was ruled statutory basis was not needed.

listed exemptions exist in the law? What if, in the same context, same party in interest distorts the focus of Rule 4003(b) objection provisions to have new meaning in that a party in interests only requirement to make a rule 4003(b) objection is when such rote checking to see if listed exemptions match up letter-by-letter, number-by number with same exemption titles in 11 USC 522(b)? Unmistakably, in the aforementioned context then Taylor is not directly dispositive and the issue is a new issue because if Rule 4003(b) is rendered nugatory by the First Circuit in the instant case, then Taylor's mandate is rendered meaningless as well.

The First Circuit's assault on Taylor present us with a specious non-credible argument: except in cases of typographical error, in the context of appellee's new objection provision focus, no objections will ***ever*** be required because, if appellee's limited objection focus as adopted by the First circuit is allowed to stand the instant case, all exemptions that are typographical correct need not be objected to under Rule 4003(b) since all such exemptions are allowed by the law (bankruptcy code) in that they ***are*** the law under 11 USC 522(b). Thus, in a practical sense, rule 4003(b) is rendered nugatory since all claims which are perceived as being questionable as to their merit need not be objected to for purposes of convening a Rule 4003(c) hearing - the bankruptcy court can adjudicate on merit of same exemptions at will anytime the case is open even years later as long as the exemptions listed were typographically correct in that they exist under the law.[2]

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[2] Appellant reasons that in the rare circumstance that an exemption did not exist in the code it would be a typographical error (i.e., nominally incorrect), though appellant admits that it is even further remotely possible that there could be a juxtaposition of numbers and letters proffered as an exemption that in fact are not typographical errors in that they are cites of laws correctly listed that are laws but not bankruptcy exemptions. Thus, by

The First Circuit took the above rationale by appellee/trustee Monzack for excusing his failure to make a Rule 4003(b) objection ("The trustee did not object to the debtor's claim of exempt property as the exemptions stated by the debtors are allowed by the bankruptcy code.", appellee brief, USCA, page 6) and put a more subtle and professional spin on it to reassert in more reasonably palatable form appellee's egregious untenable rationalization for his failure to make a rule 4003(b) objection - "...initially claimed exemption was valid on its face, and thus no objection was required." Mercer v. Monzack, 53 F. 3d 1, 1 (1st cir. 1995). Though just as clearly incorrect, this appears far more reasonable than the trustee's earlier statement that the trustee did not object because, in effect, there was nothing to object to. However, the disingenuousness of the "...valid on its face...", Ibid., rationale becomes clear when one realizes that "...facially valid...", Id.@2, in the rule 4003(b) objection context must mean, since subsequent time barred adjudication on the merits of same exemptions denied same exemptions, that "...facially valid..." is new rhetoric with the same purpose and meaning as trustee's statement "...allowed by the bankruptcy code...", appellee brief, USCA, page 6, which, as stated, was appellee/trustee's reason for not making a rule 4003(b) objection.

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logical necessity where the merit of exemptions as the focus of the objection provisions of rule 4003(b) has been ruled out by the First Circuit as the correct focus of rule 4003(b) objection provisions, in combination with the reason proffered by appellee for failure to make a timely rule 4003(b) objection "...exemptions stated by the debtor are allowed by the Bankruptcy Code.", appellee brief, USCA, page 6, ***forces the unavoidable conclusion that "...facially valid...", Mercer v. Monzack, 53 F.3d 1,2, must refer only to the correctness of the listing of the exemption in name only*** without regard to its perceived merit in relation to the claim of exempt property.

Such a ruling, other than its rendering in effect rule 4003(b) and 11 USC 522(l) nugatory, cannot be allowed to stand because it renders the new threshold for objection focus for rule 4003(b) on a subjective dynamic definition of what constitutes "...facially valid...", Mercer v. Monzack, 53 F. 3d 1, 2 (1st cir. 1995) exempt claims that irrefutably would vary from court to court rendering a death knell for literalism in bankruptcy as espoused by Taylor and in direct conflict with the Taylor mandate of finality and certainty in bankruptcy.

> "The time limits and obligations established by section 522(l) and Rule 4003(b) serve the dual purposes of finality and certainty. In the bankruptcy context, the need for finality and certainty is especially acute." Taylor v. Freeland & Kronz, 938 F.2d 420, 425 (3rd cir., 1991, affrm'd S.Ct.)

No one should be misled into believing the First Circuit's definition of "...facially valid...", Mercer v. Monzack, Id. @2, as the new rule 4003(b) objection threshold is merits oriented because, were that so that court would not have split responsibility for misjudgments of facially valid (or failure to make that judgment) from the accountability Taylor requires for failing to make such a rule 4003(b) objection - whatever claimed by debtor as exempt is exempt pursuant to the literal interpretation of 11 USC 522(l). The expeditious combination of the First Circuit emasculating rule 4003(b) by removing its intended objection focus from perceived merits of exemptions and allowing the bankruptcy courts to subsequently at any later date while the case remains open to deny same exemptions based on a hitherto time-barred adjudication on merits of same exemptions speaks volumes as to the quality, motivation and depth of the First Circuit's decision.

The First Circuit's secondary argument for their seemingly indefensible retention of jurisdiction past the rule 4003(b) bar date over adjudication of exempt property claimed as 100% exempt where no rule 4003(b) objection was made is that, as their argument goes, the bankruptcy court can indirectly claim jurisdiction to adjudicate on the merit of exemptions where the asset in question, as in the instant case, is an unallocated sum in order to determine the intent of that allocation. Their argument is that a debtor cannot exempt an asset, for example, for a disability if that asset was a settlement for pain and suffering rather than a settlement for permanent disability. Thus, as their argument goes, in the instant case the unallocated sum of $50,000 if it could be proved to be all for pain and suffering and not for either of appellant's 100% exemptions (for permanent disability, 11 USC 522(d)(10)(C) or loss of future earnings, 11 USC 522(d)(11)(E)) then the exempt claim could ostensibly be properly denied as debtor would be referencing as 100% exempt funds not part of the bankruptcy estate (i.e. - non-existent funds by that description). Taylor provides ample evidence this is a settled issue in favor of appellant the instant case in that the debtor's 100% exempt claim for loss of future earnings in that case under 11 USC 522(d), not able to be denied as to do so would be proscribed adjudication on merits of exemptions, controlled the asset in that case even though an ***allocated*** settlement agreement existed that specified significant portions of the settlement ***were not*** loss of future earnings. Thus, it is a settled issue that when an asset is referenced in schedule B-3 and B-4 it is inconsequential what the intended purpose of that settlement is where no rule 4003(b) objection has been made.

Clearly In Re Mercer, 158 B.R. 886, 889 (Bkrtcy.D.R.I. 1993) the bankruptcy court denied both appellant's 100%

exemptions based on their alleged lack of merit so it is inescapable proscribed adjudication on the merits of exemptions occurred. Whether a bankruptcy court directly attacks the merit of exemptions when there is an uncontested failure of a party in interest to make a timely rule 4003(b) objection or indirectly attacks same exemptions under the guise of determining if an unallocated sum was intended for disability or loss of future earnings for purposes of determining if that unallocated sum was intended for those exempted items ***the result is the same - proscribed adjudication on the merit of exemptions has irrefutably occurred.*** The "two step approach " for objecting to exemptions as delineated in Taylor v. Freeland & Kronz, 938 F.2d 420, 426 (3rd cir. 1991, affrm'd S.Ct.) obviates step two (which is adjudication on the merit of exemptions) if step one (the rule 4003(b) objection) is not timely filed.

Thus, the First Circuit's ruling in this case is a direct assault on rule 4003(b) and the Taylor v. Freeland & Kronz, 112 S.Ct. 1644 (1992) mandate - it allows adjudication on the merit of exemptions for the two reasons as delineated above.

Reiterating, the focus of objection provisions has been diminished to the point of rendering rule 4003(b) effectively nugatory. A direct assault is also made on Taylor by allowing the aforementioned proscribed adjudication on merit of exemptions ostensibly to determine the intent of an unallocated asset referenced as exempt by debtor. When it is ruled by that adjudication that that asset is not part of the estate in that it was not intended for the exemption(s) delineated by debtor (or, putting it another way, no statutory basis for exemption claimed), the debtor's pursuit of the exempt claim upon higher appeal ***is then characterized wrongfully as an expanded exempt claim whereby, as the court's argument goes, debtor is asking for exempt property not initially referenced by debtor on exemption schedules.***

Thus, when a debtor pursues on appeal from a bankruptcy court ruling of a denial of a 100% claim, as in the instant case, that appeal is construed by the court as a "...subsequent claim..." (headnote #1, k2801, Mercer v. Monzack, 53 F. 3d 1,1 (1st cir. 1995) - debtor then stands wrongfully accused of enlarging exempt claim post-petition in the context of Shoemaker, 155 B.R. 552 (Bankr. N.D.Ala. 1992) cited In Re Mercer, 158 B.R. 886, 888 (Bkrtcy D.R.I. 1993) when in reality the 100% exempt claim is not expanded beyond that which was claimed in the instant case on amended B-4 initial bankruptcy petition. In the limited and false context of accepting as legitimate the proscribed adjudication by the bankruptcy court, however, a pursuit of the 100% exempt claim subsequent to the bankruptcy court ruling that the unallocated sum was ruled not to be for disability or loss of future earnings ostensibly meant then, in their view, that the exempt claims has been enlarged in that the exempt claim ***then*** includes property purportedly not referenced by appellant's amended B-4 (since the asset is not referenced by the exemption, for the debtor to still pursue 100% of that asset, as their argument goes, is expanding the exempt claim to be something it was not initially on petition schedules). This argumentation is all prefaced on the bankruptcy court allocating, via adjudicating on merits of exemptions, in a time barred manner the unallocated settlement to be not referenced by debtor 100% exemptions. It is truly a weak argument by the First Circuit that if debtor is not permanently disabled or has no loss of future earnings in their view, as proffered by the bankruptcy court proceedings the instant case in their time-barred adjudication on merits of exemptions, In Re Mercer, 158 B.R. 886, 889 (Bkrtcy.D.R.I. 1993), then, as their argument goes, the unallocated settlement ***could not have been intended*** for permanent disability or loss of future earnings and therefor debtor was referencing as exempt property property not in the bankruptcy estate and, more

precisely, non-existent property in their view. Irregardless, the unallocated settlement argument does not grant jurisdiction for the bankruptcy court to deny exemptions per Taylor (see In Re Davis, [is bankruptcy court Taylor], 118 B.R. 272 @ 276, ftn. #3 (W.D.Pa. 1990, rvrsd. 3rd cir, 3rd cir. reversal affrm'd S.Ct.). Ultimately, in Taylor, Id., debtor Davis controlled the asset to be what she stated it to be on her exemption schedules as loss of future earnings per 11 USC 522(d) despite an allocated settlement to the contrary.

Thus, if the First Circuit ruling is allowed to stand, a ruling will exist allowing adjudication on the merit of exemptions in the dual manner indicated above in direct contravention of the intent of Taylor and in direct conflict with the seventh's circuit Kazi prohibition against any adjudication on the merit of exemptions for any reason where there is no rule 40003(b) objection. Kazi, Id. is clearly in line with Taylor while Mercer v. Monzack, 53 F.3d (1st cir. 1995) clearly is in direct contravention of the Taylor mandate of finality and certainty in bankruptcy and literalism in bankruptcy.

Certiorari should be granted if this court wishes the Taylor mandate of literalism in bankruptcy, of finality and certainty in bankruptcy to continue. In Mercer v. Monzack, 53 F.3d, 1 (1st cir. 1995) Judge Cyr attempts to overcome misplaced case references (Id. @ 3), weak argumentation and specious reasoning with an argument of last resort that the bankruptcy courts have the right to bypass rule 4003(b) and 11 USC 522(l) with their powers of "....exclusive summary jurisdiction" citing "In Re Stumpff 109 B.R. 1014, 1017 (Bankr.E.D.Okla.1989)" - Mercer v. Monzack, 53 F.3d, 1,3 (1st cir. 1995). Can there be little doubt that Taylor conclusively resolved the conflict between 11 USC 541(a)(1) and 11 USC 522(l) at the bright-line date certain, where there is no rule 4003(b) objection, of the terminus of the 30 day

objection period? - 11 USC 522(l) becoming operative at that point in place of 11 USC 541(a)(1). Are we to believe that the bankruptcy courts' power of summary jurisdiction as delineated in Stumpff, Id., in 1989 as related by Judge Cyr supersedes the Supreme Court mandate of Taylor in 1992 three years subsequent to the Stumpff case denying same authority to retain jurisdiction to disallow exemptions past the bar date when no rule 4003(b) objection has been made?

The First Circuit's two prong attack on Taylor the instant case effectively terminates the mandates of Taylor and reverts bankruptcy administration to a time pre-Taylor where every chapter seven exempt claim underwent the two-step approach even where no rule 4003(b) objection was made (Taylor precluding the step two adjudication on the merit of exempt claim where no rule 4003(b) objection made). The decision by the First Circuit the instant case effectively turns the intent of bankruptcy administration on its head by removing any accountability for trustee's examining perceived merits of exemptions during the thirty day period as in essence all exemptions nominally are allowed by law (in their radical changing of the focus of rule 4003(b) objection provisions).

Mercer v. Monzack, 53 F.3d, 1 (1st cir. 1995) in essence opens the doors for trustees to have a free for all in subjectively determining themselves without any accountability under 11 USC 522(l) for failure to make a Rule 4003(b) objection - as each trustee may expediently change such an arbitrary definition from case to case to fit the needs of that case since the subjective basis of the new "...facially valid ..." Id.@2, threshold of objection is so arbitrary it must be by definition dynamic rather than static and predictable as needs be for orderly and consistent bankruptcy administration. ***Ultimately, Mercer v. Monzack, Id., represents a sea change in bankruptcy administration by terminating the***

bright line date certain[3] ***mandated by Taylor's literal enforcement of 11 USC 522(l)*** since adjudication on the merits of exemptions is in effect never precluded by 11 USC 522(l) and the thirty day bar date of bankruptcy rule 4003(b) has no effect. In Mercer v. Monzack, Id., henceforth debtors will no longer be able to ascertain what is exempt and what is not 30 days after filing petition or amended petition until the case closes, perhaps years later - the bankruptcy courts reserving the right at any later date to adjudicate upon, and ultimately deny, claimed exempt property. Even a cursory review of Taylor v. Freeland & Kronz, 938 F.2d 420, 425-426 (3rd cir. 1991, affrm'd S.Ct.) would indicate that the instant case is in direct contravention of the intendment of Taylor v. Freeland & Kronz, 938 F.2d 420, 426 (3rd cir. 1991, affrm'd S.Ct.). In the Matter of Kazi, 98 F.2d 318, 320 (7th cir. 1993) the proscribed adjudication on merits of debtor exemptions that irrefutably occurred the instant case sets a direct conflict between the First Circuit and the Seventh Circuit on this issue. (see also Matter of Salzar, 52 F.3d. 708, 711-712 (7th cir. 1995) case referencing Kazi). Certiorari should be granted to fully review if this Court wishes to allow such a radical change in bankruptcy administration as Mercer v. Monzack, Id., undeniably will become the basis for that change.

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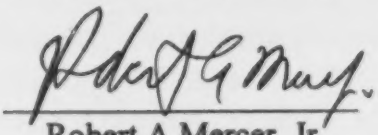
[3] "...and the text here admits to no exceptions to the bright line procedural rule." Taylor v. Freeland & Kronz, F. 2d 420, 425 (3rd cir. 1991, affrm'd S.Ct.)

> "The debtor from that day forward can treat exempted property as his or her own and is not forced to wait until some unknown future date when the trustee or another party in interest might haul the debtor into court seeking that property." Ibid.

Dated: December 11, 1995

Respectfully submitted,



Robert A Mercer, Jr.

~~Pro~~ se

(401) 942-2167

POB 6791
Providence, RI 02940

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

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In re: :

ROBERT A. MERCER, JR. : BK No. 91-11642
ANNE M. MERCER Chapter 7
Debtors :

----------x

STATEMENT OF REASONS, FINDINGS OF FACT, AND LEGAL AUTHORITY, FILED IN COMPLIANCE WITH ORDER OF REMAND

APPEARANCES:

Robert A. Mercer, Jr.
Pro se
P.O. Box 6791
Providence, Rhode Island 02940-6791

Timothy O' Hara, Esq.
Attorney for Anne M. Mercer
RESMINI & O' HARA
155 South Main Street, Suite 400
Providence, Rhode Island 02903

Jason Monzack. Esq.
Chapter 7 Trustee
KIRSHENBAUM & KIRSHENBAUM
888 Reservoir Avenue
Cranston, Rhode Island 02910

BEFORE ARTHUR N. VOTOLATO, United States Bankruptcy Judge

Heard on May 20, 1993 on the District Court's Order remanding this proceeding to the Bankruptcy Court " for a statement of reasons, findings of fact, and legal authority for its May 26, 1992 summary granting of Trustee's Motion . . . that the debtors' counsel 'immediately turnover to the trustee' a $50,000 settlement check.' "*In re Mercer,* No. 92-0343 P (D.R.I. Sept. 17, 1992). After hearing, we ordered the parties to submit supplemental memoranda addressing their respective positions as to what portion of the Debtor's $50,000 personal injury settlement is exempt under 1 U.S.C. 522(d).

FACTS

Robert Mercer sustained personal injuries in an automobile accident on January 19, 1990, and as a result he initiated a claim against the alleged tort-feasor. On June 19, 1991, Mercer and his wife Anne filed a joint Chapter 7 petition, and by operation of law pending negligence claim became an asset of the bankruptcy estate. 11 U.S.C. 541 (a) (1). In their original scheduled, the Debtors listed the personal injury claim as an asset with a market value of $15,000. Claiming federal exemptions, the Mercers listed a "Possible Personal Injury Settlement Injury & Wrongfully [sic] Death Recov." as exempt, in the amount of $7,500, pursuant to 11 U.S.C. 522 (d) (11). On August 2, 1991, the Debtors amended their B-3 schedule of assets by increasing the potential value of the settlement to $40,000. The Debtors also amended Schedule B-4 as follows:

Type of Property Location, Description,	**Statute**	**Exempt Amount**
Any property not yet scheduled		Debtor
Possible personal injury settlement		
Disability	11 USC 522(d) (10) C	100%
Payment on account of personal bodily injury	11 USC 522(d) (11) D	7,500
Payment in compensation for loss of future earnings	11 USC 522(d) (11) E	100%
Any property selected by debtor	11 USC 522(d) (5)	3,750
. . . .		
Possible Consortium Claim		SPOUSE
Payment on acct of bodily injury	11 USC 522(d) (11)D	7,500
Any property selected by debtor	11 USC 522(d) (5)	3,750

On January 19, 1993, we approved the Chapter 7 Trustee's Application to Compromise Mr. Mercer's claim for $50,00, and the entire recovery was placed in escrow jointly with the Trustee, Jason Monzack, Esq., and Mercer's personal injury attorney, Timothy O'Hara, Esq. The settlement consisted of a single lump sum payment, with no designation or allocation to specific categories of damages.

The Trustee does not object to the Debtors' claimed exemptions, but has filed a Motion for Turnover and for Determination of the Estate's Interest in settlement Proceeds of Debtors' Personal Injury Claim.

Discussion

Mercer argues that he is entitled to the entire settlement, pursuant to *Taylor v. Freeland & Kronz*, - U.S. -, 112 S. Ct. 1644 (1992), on the ground that the Trustee has not made a timely objection to his claim to the entire settlement amount. The Trustee counters that he did not object because the exemptions as claimed are valid, and thus there was no reason to object. The Trustee contends that the dispute centers around what portions of the settlement proceeds are allocable to compensation for disability, personal bodily injury, pain and suffering, actual pecuniary loss or loss of future earnings.

We will first address an issue raised by the Debtor in his supplemental memorandum, i.e. that he has been prejudiced by the Order entered on May 27, 1993, which states in part:

> 2. . . . [T] he Trustee shall submit a supplementary memorandum to this Court, wherein the Trustee will state his position regarding what portion of the Fifty Thousand and 00/100 ($50,00.00) Dollar settlement should be attributed to a disability benefit, a payment on account of personal bodily injury, a payment on account of pain and suffering, compensation for actual pecuniary loss, or payment in compensation of loss of future earnings.

3. Within three (3) weeks after Debtors have received that memorandum referred to in paragraph 2 of this Order, the Debtors shall submit their memorandum regarding those same issues.

Mr. Mercer argues that the Order allows "Trustee Monzack the opportunity, via memorandum, to conduct a time barred defacto hearing on objection to exemptions in direct contravention of rule 4003 (b) while simultaneously excluding Debtor arguments critical to Debtor's stance that the proceeds are 100% exempt." (Debtors Supp. Mem. at 5). Although the parties have indeed been requested to focus on how the settlement proceeds should be allocated, we cannot agree that Mercer has been prejudiced by said Order. To the contrary , Mercer has submitted a twenty-six page supplemental memorandum with exhibits attached, including two Appellant briefs previously submitted to the District Court. This Debtor has been afforded and has helped himself to a wide latitude in presenting all of his arguments, and then some.

When it is all said and done, however, Mr. Mercer 's position is based solely y on the issues discussed in *Taylor*, where the debtor claimed as exempt the proceeds she expected to receive from an employment discrimination lawsuit. There, the property was described as " 'Proceeds from law suit -- [Davis] v. TWA' and ' Claim for lost wages' and listed its value as 'unknown.'" 112 S. Ct. at 1646. The trustee did not object to the claimed exemption, and the Supreme Court held that he was time barred from raising *any* objection after the 30 day deadline set forth in Bankruptcy Rule 4003, regardless of whether or not the debtor had a "colorable statutory basis" for claiming the exemption. *Id.* at 1648. The Court in *Taylor* allowed the debtor to retain the entire proceeds form the suit, citing 11 U.S.C. 522(1) which

states "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt." *Id.* We find that *Taylor* is clearly distinguishable from the instant case, and therefore not controlling.

When the trustee in Taylor reviewed the debtor's exemptions, including the lawsuit with a value listed as "unknown," he was reasonably placed on notice that the debtor may be claiming more than that to which she was entitled . Listing the value as unknown "was tantamount to waiving a red flag in the trustee's face, as if to say, 'it may be worth more than the law allows, but I'm claiming it anyway.' " *In re Shoemaker*, 155 B.R. 552, at 555 (Bankr. N.D. Ala. 1992). In this case however, there was no "red flag." The Trustee was not on similar notice, because the Debtors were claiming exemptions to which they are fully entitled to under federal law. On Schedule B-4, Mercer listed his potential settlement and under the heading "Exempt Amount," he placed the word "DEBTOR".[1] He then listed various other items which are also exempt under federal law. (See Facts, *supra*.) The exemptions claimed are exactly what 11 U.S.C. 522 (d) allows, and had the Trustee filed an objection it probably would have been without merit, and perhaps even constituted a frivolous pleading subject to Rule 9011 sanctions.

The Debtors argue that by listing "Disability, 11 USC 522(d) (10)C, 100%, "their intent was to exempt one-hundred percent of the personal injury settlement, as opposed to one-hundred percent of the payment that pertains to *disability* as allowed by the Code. This argument fails, however, in light of the Debtors' own (inconsistent) breakdown of the settlement into four different categories. (See Facts, *supra*.)

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[1] Had he stated the amount as "100%" or "unknown", this may have been a *Taylor* case.

Had *disability* been listed as the only claimed exemption, Mercer's position might have been stronger, since the Trustee would then have been on notice that the Debtors could be claiming an exemption in excess of the statutory allowance. However, based in his schedule B-4, Robert Mercer is claiming as exempt only that which 522(d) of the Code allows - - - 100% of the payment that pertains to disability, $7,500 on account of personal bodily injury, 100% of the payment that pertains to the loss of future earnings , and $3,750 under the "catch all" exemption. Accordingly, we find that the Trustee was correct and reasonable in not objecting.[2]

It is agreed that the exemptions claimed by Mrs. Mercer are not applicable, because the settlement did not encompass a claim for loss of consortium, and that we are dealing here only with the four categories of exemptions claimed by Mr. Mercer, which are treated as follows:

We approve Mercer's claimed exemption of $7,500 attributable to personal bodily injury pursuant to 11 U.S.C. 522 (d) (11) (D) because he has shown, and the Trustee agrees, that the settlement includes at least that amount for personal bodily injury. The same holds true as to $3,750 of the settlement proceeds claimed as exempt under 11 U.S.C. 522 (d) (5). [3]

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[2] We note that if the Trustee were required to object to exemptions as the Debtor argues, this would create an unintended administrative nightmare for trustees and courts, since trustees would be required to object in virtually every case, even where the claimed exemption appears valid on its face. We are satisfied that the Code does not require trustee's to operate in that fashion, *Taylor* notwithstanding.

[3] We disagree with the Trustee's argument that this should be reduced to $3,240 since Mercer applied a portion of this "catch all" exemption to other schedule exemptions. This is clearly an item about

In determining what part of the settlement pertains to disability, we find the legislative history to 522(d) (10) enlightening, where Congress stated:

> Paragraph (10) exempts certain benefits *that are akin to future earnings of debtor*. These include social security, unemployment compensation, or public assistance benefits, veterans benefits, disability, illness, or unemployment benefits . . . .

H.R. 595, 95th Cong. 1st Sess. 362 (1977) (emphasis added). It is reasonable therefore, to conclude that a disability payment is exempt under the Code if the payment is in the nature of lost future earnings. Mercer argues that because his treating physician feels that he has a 10% disability involving his back and leg (Letter from Dr. Robert Farrelly, March 31, 1992), the entire settlement was compensation for said "disability". This argument avoids and fails to address what portion of the settlement is attributable to future earnings. In Mercer's statement regarding lost earnings (Lost earnings Statement June 1, 1993, Trustee's Ex. 4), he states that technically he lost no earnings because he utilized his sick leave to compensate for any days missed from work. . He further states that in December 1992, he began seeking a "non-job related disability retirement" but abandoned that course because his condition *improved*. Based on the record before us, we find that Mercer has failed to establish that any of the settlement proceeds are attributable to future earnings, which would constitute an allowable exemption under 522 (d) (10). Accordingly, Debtor's claimed exemption under 522 (d) (10) is disallowed.

Mr. Mercer is also claming 100% of "the payment in compensation for loss of future earnings" as exempt under

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which the Trustee had notice, and which should have been raised by a timely objection, according to *Taylor*.

522 (d) (11) (E). As we stated above, Mercer has not established that any of the settlement proceeds are attributable to future earnings and therefore this claim of exemption is also disallowed.

Based upon the foregoing discussion and analysis, we conclude that the Debtors are entitled to $11,250 of the settlement proceeds as exempt property, and that the remaining $38,750 is property of the estate. The attorney fees of Mr. O'Hara should be apportioned pro rata according to each party's respective distribution, and he is allowed 30 days within which to file an application to be compensated out of the Estate's share.

Finally, we address the Trustee's request to offset the Debtors' share by $3,900, on the ground that the Debtors have listed as an asset a diamond ring which is jointly owned, and upon which they place a value of $4,300 (see schedule B-2) . Mrs. Mercer has claimed a $400 exemption for jewelry (see Schedule B-4), leaving $3,900 worth of the ring as property of the Estate. The Debtors are allowed ten (10) days to decide if they wish to deliver the ring to the Trustee and receive their statutory exemption. If the Debtors choose not to surrender the ring, The Trustee is authorized to offset the amount of their exemption by $3, 900, and remit the balance ($7,350) to the Debtors.

Enter Judgment consistent with this opinion.

Dated at Providence, Rhode Island, this 16th day of September, 1993.

"s/ Arthur N. Votolato "
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

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In re: :

ROBERT A. MERCER, JR. : BK No. 91-11642
ANNE M. MERCER Chapter 7
Debtors :

---x

JUDGMENT

In accordance with Fed. R. Bankr. P. 9021, and for the reasons set forth in the DECISION AND ORDER issued by the Honorable Arthur N. Votolato, United States Bankruptcy Judge, on September 16, 1993, Judgment is hereby entered.

"s/ Leah G. Waterman"
Deputy Clerk

September 16, 1993

cc: Robert A. Mercer, Jr., Pro se
Timothy O'Hara, Esq.
Jason Monzack, Esq.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

---x

In re: :

ROBERT A. MERCER, JR. : BK No. 91-11642
ANNE M. MERCER Chapter 7
Debtors :

---x

CERTIFICATE OF MAILING

I, Leah G. Waterman. a regularly appointed and qualified clerk in the office of the Bankruptcy Court for the District of Rhode Island and Secretary to the Bankruptcy Judge hereby certify:

1. That I personally, pursuant to instructions from the Court and in performance of my duties as clerk mailed, in a sealed envelope bearing the lawful frank of the Court and the name and address of each of the parties at their respective addresses listed below, a true copy of the DECISION AND ORDER dated September 16, 1993.

2. That the envelope containing such decision and order was deposited by me in a regular United States mail box in the City of Providence in said District on September 16, 1993.

Robert A. Mercer, Jr.
Pro se
P.O. Box 6792
Providence, RI
02940-6791

Timothy O'Hara, Esq.
Attorney for Anne M. Mercer
RESMINI & O'HARA
155 South Main Street, Ste. 400
Providence, RI 02903

Jason Monzack, Esq.
Chapter 7 Trustee
KIRSHENBAUM &
KIRSHENBAUM
888 Reservoir Avenue
Cranston, RI 02910

Office of the U. S. Trustee
Attn: Gary Donahue, Esq.
10 Causeway Street, Rm.472
Boston, MA 02222-0143

"s/ Leah G. Waterman "
Deputy Clerk

Date: September 16, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Robert A . Mercer , Jr.
appellant/ debtor,

v. CA92-0343P
BK No. 91-11642

Jason Monzack, Esq.
appellee / bankruptcy trustee

Report and Recommendation

Timothy M. Boudewyns, U.S. Magistrate Judge.

This is an appeal from a May 26, 1992 bankruptcy court order, requiring Robert A. Mercer Jr. ("Mercer" or "the debtor") to turn over $50,000 received in settlement for a personal injury claim. This matter has been referred to me for preliminary review, findings, and recommended disposition.[1] Based on the following analysis, I recommend that the appeal be denied.

Procedural History

Debtor and his wife[2] filed a voluntary bankruptcy petition on June 19, 1991. On May 26, 1992 , the bankruptcy court granted the Trustee in bankruptcy's ("Trustee") motion that the debtor be ordered to immediately turnover to the 331trustee a $50,000 settlement check. After the debtor filed

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1 28 U.S.C. 636 (b)(1) (B); Mathews v. Weber, 423 U.S. 261 (1976).

2 Mrs. Mercer has not participated in this appeal.

a notice of appeal, this Court, on May 20, 1993, ordered that the proceedings be remanded to the bankruptcy court for a statement of reasons , findings of fact, and legal authority in support of its order. The bankruptcy judge has written a legal opinion dated September 16, 1993 which complies with the Court's remand Order.

Facts[3]

Mercer sustained personal injuries in an automobile accident on January 19, 1990. As a result he initiated a claim against the alleged tortfeasor. On June 19, 1991, Mercer and his wife filed a joint Chapter 7 petition, and, by operation of law, the pending negligence claim became an asset of the bankruptcy estate.[4]

In their original schedules, the debtors listed the personal injury claim as an asset with a market value of $15,000. The Mercers also claimed a portion of this as exempt pursuant to 11 U.S.C. 522(d) (11) (D) in the amount of $7,500. The claimed exemption was for a "Possible Personal Injury Settlement-Injury & Wrongfully [sic] Death Recov." Debtors amended this exemption on August 2, 1991. They amended their scheduled B-3 by increasing the value of the settlement to $40,000 and amended B-4 as follows[5]:

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[3] The facts as described in the bankruptcy court's opinion have not been objected to by either party.

[4] 11 U.S.C. 541(a) (1).

[5] Below is a graphic representation of the exemption schedule. The original exemption scheduled is attached for the Court's reference.

Type of Property: Location, Description, Use	**Statute**	**Exempt Amount**
Any property not yet scheduled- Possible personal injury Settlement		Debtor
Disability	11 USC 522(d) (10) C	100%
Payment on account of personal bodily injury	11 USC 522(d) (11) D	$7,500
Payment in compensation for loss of future earning	11 USC 522(11) E	100%
Any property selected by debtor	11 USC 522(d) (5)	$3,750
Possible Consortium Claim		*SPOUSE*
Payment on acct of personal bodily injury	11 USC 522(d) (11) D	$7,500
Any property selected by debtor	11 USC 522(d) (5)	$3,750

The trustee did not object to these claimed exemptions within the thirty days allotted under Bankruptcy Rule 4003.[6] The

[6] Bankruptcy Rile 4003(b) provides: "The trustee or any creditor may file objections to the list of property claimed as exempt within 30

ultimate amount of the settlement was $50,000 in a single lump sum payment, with no designation or allocation of funds to any specific category of damages. On motion by the trustee, the entire sum was placed in escrow, jointly under custody of the Trustee and Mercer's personal injury attorney. The bankruptcy court later determined that the entire amount should be allocated to personal injury compensation, rather than any payment for disability or loss of future earnings. The bankruptcy court then allowed a statutory $7,500 exemption for personal bodily injury and a $3,750 exemption for the so-called "catch-all" exemption pursuant to 11 U.S.C. 522 (d) (5). These amounts coincided with the statutory exemptions claimed by the debtor on his amended schedule B-4. The bankruptcy court then ordered the turnover of the remainder of the $50,000. The issue now before the Court is whether the bankruptcy court properly ordered the turnover of the $50,000 settlement, even though the Trustee failed to object to the debtor's claimed exemption within the thirty days period set by law.[7]

Discussion

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days after the conclusion of the meeting of creditors held pursuant to rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and the attorney for such person."

[7] Other issues connected to this motion were withdrawn or conceded at the hearing on this matter. Specifically, debtor withdrew his position on the disposition of a diamond ring. Debtor also stated that he does not contest the bankruptcy court's allocation of the $50,000 settlement payment to personal injury compensation (rather than disability).

A district court may set aside a bankruptcy court's factual finding only when clearly erroneous.[8] Questions of law, however, must be considered de novo.[9]

In this appeal, debtor argues that he claimed in this amended exemption schedule a one hundred percent exemption of the injury settlement as a "disability payment." He noted that trustee failed to object within thirty days of this claim in accordance with Bankruptcy Rule 4003(b). Because the Trustee failed to make a timely objection, debtor argues , the Trustee waived any right to contest this claimed exemption. For this proposition, Debtor cites the recent Supreme Court case of Taylor v. Freeland & Krontz.[10] As discussed below, Judge Votolato was correct in holding that Taylor is distinguishable from the instant case.

In Taylor, the debtor claimed as exempt " ' Proceeds from lawsuit--[Davis] v. TWA' and 'Claim for lost wages' and listed its value as 'unknown.' "[11] The trustee did not object to the claimed exemption, and the Supreme Court held that he was time-barred from raising any objection.[12] The Court in Taylor allowed the debtor to retain the entire proceeds from

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8 Bank.R. 8013; See Acacia Mutual Life Ins. Co. v. Perimeter Park Inv. Assocs. (In re Perimeter Park Inv. Assocs.) , 616 F.2d 150, 151 (5th Cir.1980); First Software Corp. v. Computer Assocs. Int'l., (In re First Software Corp.), 107 B.R. 417, 420 (D.Mass.1989).

9 In re Pizza of Hawaii, Inc., 40 B.R. 1014, 1015 (D.Haw.1984), aff'd, 761 F.2nd 1374 (9th Cir.1985); First Software Corp., 107 B.R. at 420.

10 ___ U.S. ___, 112 S.Ct. 1644 (1992).

11 112 S. Ct. at 1646.

12 Id. at 1648.

the suit, citing 11 U.S.C. 522 (1) which states "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt."[13] Importantly, the Court in Taylor was faced with a situation where:

> [the debtor] did not have a right to exempt more than a small portion of [the] proceeds either under state law or under the federal exemptions specified in 522(d). [The debtor] in fact claimed the full amount as exempt. [The Trustee], as a result, apparently could have made a valid objection under 522 (1) and Rule 4003 if he had acted promptly.[14]

In Taylor, listing the value of the claim as unknown and claiming the full amount as exempt "was tantamount to waiving a red flag in the trustee's face, as if to say, 'It may be worth more than the law allows, but I'm claiming it anyway.' "[15]

In this case, there was no red flag. In fact, the trustee did not object because Mercer claimed exactly what he was entitled to under the law (and what he actually will receive). Specifically, debtor cited the applicable provisions of the bankruptcy code almost verbatim: he claimed 100% of funds which are "disability" payments, $7,500 of the funds which are "personal injury" compensation, and 100% of the funds which are for payment of "future earnings." These amounts could not be calculated until the bankruptcy court determined the proportionate makeup of the $50,000 settlement.[16] Thus,

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13 Id.

14 Id. at 1647-48.

15 In re Shoemaker, 155 B.R. at 555 (Bankr. N.D. Ala. 1992).

16 The bankruptcy court's allocation of the $50,000 to personal injury payment rather than to disability payment or payment for loss of future earnings was not clearly erroneous. Debtor indicated at the hearing that he is not pressing the appeal on this issue.

instead of asking for what was clearly more than the law allows as in Taylor, the debtor in this case simply asked for what he was entitled to, subject to ultimate determination by the bankruptcy court.[17]

Mercer attempts to characterize his claimed exemption so as to fall within n the parameters of Taylor. He argues that "Disability, 11 USC 522(d) (10)C, 100%," means a claim for one-hundred percent of the future settlement as a disability payment. This argument fails, however, because on the exemption sheet, the debtor broke down his settlement into four different categories. The only plausible purpose, and the evident meaning of this breakdown, is that the debtor wanted to cover all of his losses. Whether the settlement turned out t to be "disability" or "personal injury" or "future earning," the debtor would be able to claim an exemption. In sum, the debtor never claimed more tan he was entitled to, and the trustee never had a reason to object.

---

[17] As described by the bankruptcy court,

> When the trustee in Taylor reviewed the debtor's exemptions, including the lawsuit with a value listed as "unknown," he was reasonably placed on notice that the debtor may be claiming more than that to which she was entitled . . . . In this case however, there was no "red flag." The trustee was not on similar notice, because the debtors were claiming exemptions to which they are fully entitled to under federal law . . . . The exemptions claimed are exactly what 11 U.S.C. 522 (d) allows, and had the trustee filed an objection it probably would have been without merit, and perhaps even constituted a frivolous pleading subject to Rule 9011 sanctions.

In re Robert A. Mercer, Jr., BK No. 91-11642 (September 16, 1992).

Conclusion

Mr. Mercer is entitled to the $7,500.00 he claimed as exempt for payment on account of personal bodily injury plus $3.750.00 on any personal property selected by him; the remainder of the proceeds from the personal injury settlement is an asset of the bankruptcy estate. The appeal should be denied.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten days of its receipt.[18] Failure to file specific objections in a timely manner constitutes a wavier of the right to review by the district court.[19]

"s/ Timothy M. Boudewyns "
United States Magistrate Judge
January 25, 1994

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[18] Rule 32, Local Rules of Court; Rule 72 (b), FRCP.

[19] Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980); United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986).

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

IN RE: ROBERT A. MERCER, JR.)
Bankruptcy Appeal) C.A. No. 92-0343 P

ORDER

The Report and Recommendation of United States Magistrate Judge Timothy M. Boudewyns filed on January 27, 1994 in the above-captioned matter is hereby accepted pursuant to 28 U.S.C. 636 (b) (1).

SO ORDERED:

"s/ Raymond J. Pettine"
Senior U.S. District Judge

March 18, 1994

Entered as an order of this Court March 24, 1994.

"s/ Paulette Dube"
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JUDGMENT IN A CIVIL CASE

IN RE: ROBERT A. MERCER, JR.
Bankruptcy Appeal **CA 92-0343P**

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by the Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered for the appellee Jason Monzack and against appellant, Robert A. Mercer Jr. in accordance with the Order entered by Senior Judge Raymond J. Pettine on 3/24/94 affirming Magistrate Judge Timothy Boudewyns' R&R recommending dismissal of the appeal.

March 24, 1994
Date

Raymond F. Burghardt
Clerk

"s/ Paulette Dube"
(by) Deputy Clerk

United States Court of Appeals

For the First Circuit

No. 94-1346

ROBERT A. MERCER, JR.,
Debtor, Appellant,
v.
JASON MONZACK, ESQUIRE
Appellee.

APPEAL FORM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[Hon. Raymond J. Pettine, Senior U.S. District Judge]

Before

Cyr, Boudin and Stahl,

Circuit Judges.

Robert A. Mercer, Jr. on brief pro se.
Christopher L. Russo and Kirshenbaum & Kirshenbaum on brief for appellee.

April 25, 1995

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* Reprinted slip opinion.

CYR, Circuit Judge. Robert A. Mercer, Jr., challenges a district court judgment affirming a bankruptcy court order disallowing most of Mercer's exemption claim relating to a $50,000 settlement fund in a personal injury action. We affirm.

I

BACKGROUND

After Mercer was injured in an automobile accident in January 1990, he sued for compensatory damages, then filed a chapter 7 petition while the lawsuit was still pending. His amended schedules of assets valued the personal injury claim at $40,000, and Scheduled B-4 asserted related exemptions in the manner set out in the margin.[1] The chapter 7 trustee

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[1]The pertinent entries in Schedule B-4 were as follows:

Type of Property: Location, Description, Use	Statute	Exempt Amount
Possible personal injury Settlement		DEBTOR
Disability	11 USC 522(d) (10) (C)	100%
Payment on account of personal bodily injury	11 USC 522(d) (11) (D)	$7,500
Payment in compensation for loss of future earnings	11 USC 522(d) (11) (E)	100%
Any property selected by debtor	11 USC 522(d) (5)	$3,750

interposed no Rule 4003 (b) objection to the list of property claimed as exempt. See Fed. R. Bankr. P. 4003 (b) (fixing 30-day limitation period for filing objection); see also Bankruptcy Code 522 (1), 11 U.S.C. 522 (1). The personal injury action eventually generated a $50,000 settlement fund, with no specification as to what, if any, portion represented compensation for a "disability," "personal bodily injury," or "loss of future earnings. "[2]

Mercer nevertheless contended that the entire $50,000 was exempt because he had claimed the entire fund exempt as compensation for a "disability" under Bankruptcy Code 511 (d) (10)) (C) or compensation for lost future earnings under Bankruptcy Code 522 (d) (11) (E). See supra note 1. Since no Rule 4003 (b) objection was submitted within the 30-day limitation period, Mercer argued that the bankruptcy court lacked jurisdiction to entertain the motion to disallow his exemption claim. He relied on Taylor v. Freeland & Kronz, 112 S. Ct. 1644 (1992), which held that a bankruptcy court could not order a chapter 7 debtor's attorney to turn over proceeds ultimately recovered in a prepetition lawsuit brought by the debtor, where the trustee had decided to file no Rule 4003 (b) objection to an exemption claim in the lawsuit proceeds notwithstanding the fact that there was no colorable legal basis for claiming an exemption in the total amount recovered.

The chapter 7 trustee in the instant case responded that he had filed no Rule 4003 (b) objection because Mercer had claimed allowable exemptions in the settlement proceeds

[2]Unlike the unlimited exemptions for "disability" and "lost earnings," the exemption for "personal bodily injury" compensation had been capped at $7,500. See Bankruptcy Code 522 9d) (11) (D), 11 U.S.C. 522 (d) (11) (D) (subsequently increased to $15,000). The trustee did not contest the $7,500 exemption. thus $42,500 remains in dispute on appeal.

representing compensation for "disability" or lost future earnings. Consequently, it remained for the bankruptcy court to determine whether the $42,500 in dispute did, in fact, constitute compensation for disability and/or lost future earnings.

The bankruptcy court took the position that a Rule 4003 (b) objection is not required unless the exemption claim --- as was the case in Taylor, 112 S. Ct. at 1646 --- raises a "red flag"; that is, unless the exemption claim includes unambiguous language indicating that the debtor is asserting an exemption claim which would exceed the maximum statutory allowance. Mercer v. Monzack , 158 B.R. 886, 888 (Bankr. D.R.I. 1993). The bankruptcy court hypothesized, for example, that a Rule 4003 (b) objection might have been necessary if Mercer had listed the exemption claim simply as "Disability" and the exempt amount as "100%," instead of breaking down the settlement fund into four alternative components. But since the Mercer exemption claim was framed in four alternative parts, each asserting facially valid statutory exemptions under section 522 (d), see supra note 1, the bankruptcy court concluded that it raised no "red flag" sufficient to trigger the limitation period in Rule 4003 (b).

The bankruptcy court therefore ruled that Taylor did not preclude its assertion of jurisdiction to determine whether the settlement fund represented compensation for disability or lost future earnings. Mercer, 158 B.R. at 888. It then found that the settlement fund included no compensation for disability or lost future earnings. Id. at 888-89. Accordingly, the bankruptcy court ordered Mercer to turn over all but $7,350 to the chapter 7 trustee.[3] The district

[3]The $7,350 figure reflects certain other adjustments to Mercer's exemption claim not material to the present appeal. See supra note 2.

court affirmed on intermediate appeal. Mercer v. Monzack, 170 B.R. 759 (D.R.I. 1994).

II

DISCUSSION

Although in complete agreement with the result reached below, we write to illustrate that Taylor in no sense suggests that the bankruptcy court is divested of jurisdiction to hear and determine the issue presented on appeal : whether the "property of the estate" actually in dispute was listed as exempt on Schedule B-4, thereby triggering the 30-day limitation under Rule 4003 (b). See Bankruptcy Code 522 (1), 542 (a), 11 U.S.C. 522 (1), 542 (a); Fed. R. Bankr. P. 4003 (c). In the end, we reject Mercer's implicit assumption that Taylor licenses debtors unilaterally to transform property of the estate into property of the description appearing on Schedule B-4.

We begin with the procedural mechanism in section 522 (1):

> The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. . . . Unless a party in interest objects, the property claimed as exempt on such a list is exempt.

Bankruptcy Code 522 (1), 11 U.S.C. 522 (1) (emphasis added). That is, absent inclusion on "a list of property that the debtor claims as exempt," "property of the estate" is not exempted by operation of law under section 522 (1), regardless whether a Rule 4003 (b) objection was filed. Id.; see, e.g., Seror v. Kahan (In re Kahan), 28 F.3d 79, 81 (9th Cir. 1994), cert. denied, 115 S. Ct. 1100 (1995). Indeed, the

30-day limitation on objections under Rule 4003 (b) does not begin to run until the debtor lists the "property claimed as exempt." See Fed. R. Bankr. P. 4003 (b).

The "property of the estate" plainly listed as exempt in Taylor, 112 S. Ct. at 1647-49 --- though not of a kind entitled to exemption under Bankruptcy Code 522 (d) -- nonetheless became exempt by operation of law, as explicitly provided in section 522 (1), in the absence of a timely Rule 4003 (b) objection to the unambiguous exemption claim in Schedule B-4. Nothing in Taylor intimates that "property of the estate" not plainly listed in Schedule B-4 nonetheless becomes exempt by operation of law under section 522 (1). See, e.g., Addison v. Reavis, 158 B.R. 53, 59-60 (E.D. Va. 1993), aff'd, 32 F.3d 562 (4th Cir. 1994); Seror, 28 F.3d at 82; In re Sherbahn, 170 B.R. 137, 139-40 (Bankr. N.D. Ind. 1994); Ainslie v. Grablowsky (In re Grablowsky), 149 B.R. 402, 405-06 (Bankr, E.D. Va. 1993). Thus, it remained for the bankruptcy court to determine whether the "property of the estate" actually in dispute became exempt by operation of law as Mercer maintained, or remained subject to administration for the benefit of creditors as the chapter 7 trustee contended.

The threshold question is whether the property in dispute is in fact the property of the estate listed as exempt. In stark contrast to Taylor, the bankruptcy court found -- and Mercer does not contest on appeal -- that no part of the disputed $42,500 listed on Schedule B-4 is either compensation for a disability -- 522 (d) (10) (C) -- or lost future earnings -- 522 (d) (11) (E) -- as distinguished from compensation for personal bodily injury (the maximum $7,500 exemption under 522 (d) (11) (D) as compensation for personal injury is not at issue). Rather, in a giant interpretive leap beyond Taylor , Mercer asks us to assume

that the amount in dispute became exempt by operation of law under section 522 (1) notwithstanding the uncontested finding that it is not compensation for a disability or lost future earnings.

True, Taylor requires that we interpret and apply section 522 (1) and Bankruptcy Rule 4003 (b) according to their literal intendment. But section 522 (1) neither states nor implies that property of the estate becomes property of the kind the debtor describes on Schedule B-4. Rather , as the Court recognized in Taylor, 112 S. Ct. at 1646, absent a timely Rule 4003 (b) exemption, property of the estate plainly listed on Schedule B-4 becomes exempt by operation of law under section 522 (1) without regard to whether it is property of the kind entitled to exemption under section 522 (d).

Notwithstanding Mercer's argument that he intended to exempt the entire settlement fund, Schedule B-4 plainly listed discrete statutory citations supporting the various exemption claims, thereby restricting both the focus of the exemptions claimed and the description of the particular right or interest in property of the estate to which the claims applied. Consequently, pursuant to its exclusive summary jurisdiction, see, e.g., In re Stumpff, 109 B.R. 1014, 1017 (Bankr. E.D. Okla. 1989), it remained for the bankruptcy court to determine whether the disputed right or interest in property of the estate was listed on Schedule B-4.

Neither Taylor, the Code, nor the Rules of Bankruptcy Procedure require parties in interest to interpose Rule 4003 (b) objections to Schedule B-4 exemption claims in order to preserve their right to invoke the summary jurisdiction of the bankruptcy court to determine whether property of the estate became exempt by operation of law. What parties in interest

may not do, however is let the limitation period for objections under Rule 4003 (b) expire, then enlist the jurisdiction of the court in an effort to set aside an exemption allowed by operation of law in property of the estate under section 522 (1) simply because the property listed as exempt would not have been entitled to exemption under section 522(d) but for their failure to object pursuant to Rule 4003(b).[4]

III

CONCLUSION

In sum, we affirm on the ground that the property of the estate at issue on appeal was neither listed as exempt on Schedule B-4, nor became exempt by operation of law under Bankruptcy Code 522 (1).

The district court judgment is affirmed; costs to appellee.

[4]The Supreme Court has not excluded the possibility that Bankruptcy Code 105 (a) , 11 U/S/C? 105 (a), might enable a bankruptcy court to set aside exemptions not claimed in good faith. See Taylor, 112 S. Ct. at 1649.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1346

ROBERT A. MERCER, JR.,
Debtor, Appellant,
v.
JASON MONZACK, ESQUIRE,
Appellee.

JUDGMENT

Entered: April 25, 1995

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Rhode Island.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. Costs to Appellee.

By The Court:

FRANCIS P. SCIGLIANO,
CLERK

By: Janice M. O'Neil
Chief Deputy Clerk

[cc: Messrs. Mercer, Jr. & Russo]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1346

ROBERT A. MERCER, JR.,
Plaintiff, Appellant,
v.
JASON MONZACK, ESQUIRE,
Defendant,Appellee.

Before
Torruella, Chief Judge
Selya, Cyr, Boudin, Stahl and Lynch,* Circuit Judges.

ORDER OF COURT

Entered: May 17, 1995

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefullly considered by the judges of this Court in regular active services and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petiton for rehearing and the suggestion for rehearing en banc be denied.

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* Judge Lynch did not participate in the consideration or decision of this petition.

By The Court:

FRANCIS P. SCIGLIANO,
CLERK

By: Janice M. O'Neil
Chief Deputy Clerk

[cc: Messrs. Mercer, Jr. & Russo]

No. 95-970

(2)

Supreme Court, U.S.
FILED
FEB 20 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

ROBERT A. MERCER, JR.,

Petitioner,

vs.

JASON MONZACK, ESQ.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CHRISTOPHER L. RUSSO
Counsel of Record
JASON MONZACK
KIRSHENBAUM & KIRSHENBAUM
Attorneys at Law, Inc.
Attorneys for Respondent
888 Reservoir Avenue
Cranston, Rhode Island 02910
(401) 946-3200

8335
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

18 pp

QUESTIONS PRESENTED

1. Whether the proceeds from the Petitioner's personal injury action, which was part of the bankruptcy estate, become exempt by virtue of the manner in which the Petitioner listed his exemptions under Schedule B-4?

2. Whether or not the Bankruptcy Court had the authority, pursuant to Bankruptcy Code, 11 U.S.C. § 105(a) to disallow Petitioner's claimed exemptions as not being claimed in good faith.

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STATEMENT OF THE CASE

Claiming that a split of authority exists between the First and Seventh Circuits, Petitioner, Robert Mercer, has asked that this Court review and correct a decision of the United States Court of Appeals for the First Circuit affirming a decision of the United States District Court for the District of Rhode Island. Relying primarily on this Courts decision, *Taylor v. Freeland & Kronz*, __ U.S. __, 112 S. Ct. 1644 (1992), Petitioner asserts that the First Circuit Court of Appeals erred in affirming the decision of the United States District Court for the District of Rhode Island, which in turn was affirming the United States Bankruptcy Court for the District of Rhode Island's decision ordering the Petitioner to turn over a portion of the proceeds of his personal injury settlement to the Respondent, Trustee Jason Monzack. The Petitioner claims that the manner in which he listed his exemptions under Schedule B-4 clearly and unmistakably put the Trustee on notice that he was claiming the entire proceeds from the personal injury settlement, $50,000, as exempt; and by virtue of the Trustee's failure to object, that those proceeds are now exempt as a matter of law. Respondent, Jason Monzack, Esq., on the other hand, contends that the Court of Appeals correctly held that the debtor did not properly list the entire personal injury proceeds so as to invoke the privileges that he would otherwise enjoy by the virtue of the Trustee's failure to file a Rule 4003 objection.

The Petitioner sustained personal injuries in an automobile accident on January 19, 1990, and as a result, he initiated a claim against the alleged tortfeasor. On June 19, 1991, Petitioner and his wife filed a joint Chapter 7 Petition, and by operation of law, the pending negligence claim became an asset of the bankruptcy estate. In the original schedules filed by the Petitioner, the personal injury claim was listed as an asset with a market value of $15,000. Claiming federal exemptions, the Petitioner listed a

"possible Personal Injury Settlement Injury & Wrongfully [sic] Death Recov." as exempt, in the amount of $7,500, pursuant to 11 U.S.C. § 522(d)(11)D. On August 2, 1991, the Petitioner amended Schedule B-3 by increasing the potential value of the settlement to $40,000. The Petitioner also amended Schedule B-4 as follows:

"Type of Property Location, Description	Statute	Exempt Amount
Any property not yet scheduled Possible personal injury settlement Disability	11 USC 522(d)(10)C	100%
Payment on account of personal bodily injury	11 USC 522(d)(11)D	7,500
Payment in compensation for loss of future earnings	11 USC 522(d)(11)E	100%
Any property selected by debtor	11 USC 522(d)(5)	3,750
Possible Consortium Claim		SPOUSE
Payment on acct of bodily injury	11 USC 522(d)(11)D	7,500
Any property selected by debtor"	11 USC 522(d)(5)	3,750

The Trustee, Respondent, was advised by debtor's attorney that an offer of settlement in the amount of $50,000 had been made to Robert Mercer, Jr. on his personal injury claim. On March 2, 1992, the Trustee then filed a Motion for Turnover and for Determination of the Bankruptcy Estate's Interest in the Settlement Proceeds of Debtor's Personal Injury Claim. On March 13, 1992, debtor filed a motion for extension of time to answer. The Trustee moved for production of documents from the Petitioner. On April 9, 1992, debtor filed an objection to Motion for Turnover and Answer. On April 14, 1992, Trustee filed his Motion to Compel Production of Documents, which was granted on May 4, 1992 over the Petitioner's objection of April 24, 1992. On May 8, 1992, the Trustee filed his Motion for Sanctions pursuant to Bankruptcy Rule 7037. On May 11, 1992, debtor submitted his compliance with Trustee's motion to compel production of documents. On May 20, 1992, the debtor filed his second Objection to Trustee's Motion to Compel Production of Documents and his Objection to Trustee's Motion for Sanctions, Pursuant to Bankruptcy Rule 7037. On May 22, 1992, the Bankruptcy Court dismissed the debtor's Objection to Motion for Turnover and granted the Trustee's Motion to Turnover and for Sanctions, ordering the Petitioner to turn over the total proceeds of the personal injury settlement, to wit, $50,000.

Your Petitioner appealed the granting of the Trustee's motion on May 26, 1992. The District Court of the United States for the District of Rhode Island, on September 15, 1992, remanded the matter back to the Bankruptcy Court for a statement of reasons, findings of fact, legal authority for the Bankruptcy Court's order of May 26, 1992 in summarily granting the Trustee's motion, that the debtor's counsel immediately turn over to the Trustee the $50,000 settlement proceeds.

On May 20, 1993, the matter was heard before Judge Votolato in response to the United States District Court's Order of Remand. Petitioner was unable to present evidence at the hearing to establish that any portion of the settlement proceeds were compensation for disability or loss of future earnings. *In re Mercer,* 158 B.R. at 889. Consequently, the judge found as a fact that the total settlement compensation on account of personal bodily injury. *Id.*

Judge Votolato in applying the standard set forth by this Court in *Taylor,* found that the Trustee had not made the same mistake as Taylor. Judge Votolato ruled that the debtor's listed exemptions were exactly what 11 U.S.C. § 522(d) allowed and that had the Trustee filed an objection, it probably would have been without merit, and perhaps even constituted a frivolous pleading subject to Rule 9011 sanctions. *Id.* at 888. On September 16, 1993, the United States Bankruptcy Court for the District of Rhode Island's order entered awarding the Petitioner $11,250 of the settlement proceeds as exempt property and the remaining balance of $38,750 was awarded as property of the estate. *Id.* at 889.

Petitioner timely took his appeal from the final order of Judge Votaloto, consolidating that appeal with his June 4, 1992 appeal.

In *Mercer v. Monzack,* 170 B.R. 759 (D.R.I. 1994) the United States District Court of Rhode Island affirmed the Bankruptcy Court decision. The court distinguished *Taylor* from the case before it. In Taylor, listing the value of the claim as unknown and claiming the full amount as exempt was "tantamount to waiving a red flag in the Trustee's face, as if to say, 'it may be worth more than the law allows, but I'm claiming it anyway'." *Id.* at 262, citing *In re: Schumacher,* 155 B.R. at 555 (Bankr. N.D. Ala. 1992). However, Mercer did not raise a "red

flag" in front of Monzack. Monzack did not object because Mercer *claimed exactly what he was entitled to under the law (and what he actually will receive). Id.*

The First Circuit Court of Appeals in *Mercer v. Monzack*, 53 F. 3d 1 (lst Cir. 1995) affirmed the United States District Court's Order. In so ruling, the First Circuit Court of Appeals saw the threshold question being whether the property in dispute is, *"in fact, the property of the estate listed as exempt." Id.* at 3. The First Circuit Court of Appeals noted that the Petitioner was arguing that when he listed, by example, disability "100%" he intended to exempt the entire settlement fund. The court stated:

> True, *Taylor* requires that we interpret and apply section 522(1) and Bankruptcy Rule 4003(b) according to their literal intendment. But section 522(1) neither states nor implies that property of the estate *becomes property of the kind* the debtor describes on Schedule B-4. Rather, as the Court recognized in *Taylor,* 112 S. Ct. at 1646, absent a timely Rule 4003(b) objection, property of the estate plainly listed on Schedule B-4 *becomes exempt* by operation of law under section 522(1) *without regard to whether it is property of the kind entitled to exemption* under section 522(d).

Id.

Notwithstanding the Petitioner's argument as stated above, the court noted that Petitioner's amended Schedule B-4 plainly listed discrete statutory citations supporting the various exemption claims, thereby restricting both the focus of the exemptions claimed and the description of the particular right or

interest in property of the estate to which the claims applied. *Id.* In so ruling, the First Circuit Court of Appeals held that the Bankruptcy Court for the District of Rhode Island maintained exclusive summary jurisdiction and it remained for the Bankruptcy Court to determine whether the disputed right or interest in property of the estate was listed on Schedule B-4.

The First Circuit Court of Appeals affirmed the District Court's decision on the ground that the property of the estate at issue on appeal was neither listed as exempt on Schedule B-4, nor became exempt by operation of law under Bankruptcy Code 522(1). It should also be noted that the First Circuit Court of Appeals stated in a footnote that it may have been able to affirm the District Court's decision, under Bankruptcy Code 105(a), 11 U.S.C. § 105(a), as being exemptions not claimed in good faith, which was briefed by the Respondent.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO SPLIT OF AUTHORITY BETWEEN THE CIRCUITS OR BETWEEN THE STATE TO WARRANT THE ISSUANCE OF A WRIT OF CERTIORARI.

Petitioner maintains that there is a conflict between the decisions issued by the Court of Appeals for the First Circuit in *Mercer v. Monzack*, 53 F.3d 1, and that of the Seventh Circuit in *Matter of Salzar*, 52 F.3d 708 (7th Cir. 1995) in which it affirmed the decision in The *Matter of Kazi*, 98 F.2d 318 (7th Cir. 1993). There are no real conflicts between the decision of the First and Seventh Circuit Courts of Appeals.

A. There Is No Meaningful Split of Authority Between the Circuit Courts of Appeals.

The Seventh Circuit in *Kazi* was faced with a situation where the debtor, in his original petition and schedule, claimed pension trust funds and IRA's as exempt "if said property is property of the estate." *Kazi, supra* at 322. The debtor was telling the trustee, in essence, "I think that the trust funds and IRA's are not property of the estate, but if they are, I am claiming the entire amounts as exempt." With that, the proverbial "red flag" was raised. The Trustee failed to file an objection within the thirty days as prescribed by Rule 4003(b). The Seventh Circuit held that the Trustee could not object beyond the thirty day period applying *Taylor.*

The Seventh Circuit's decision in *Kazi* is consistent with this Court's ruling in *Taylor* — when the debtor claims an exemption, which puts the Trustee on notice that he is claiming more than he is entitled to, the Trustee will be strictly held to the thirty day requirement and on the thirty-first day, the debtor will be granted an exemption for the full amount claimed.

The First Circuit Court of Appeals in *Mercer v. Monzack,* 53 F.3d 1 (1st Cir. 1995) had a quite different factual situation. In *Mercer* the debtor in his Petition and schedules raised no "red flags." The debtor claimed his exemptions specifically and literally as provided under 11 U.S.C. § 522. The Trustee did not object because the debtor was entitled to exactly what he claimed — 100% of whatever portion of the personal injury settlement was disability compensation, $7,500 of whatever portion was determined to be payment on account of personal bodily injury, 100% of any portion which was determined payment and compensation for loss of future earnings, and $3,750 for any portion of any property selected by the debtor. The Trustee admits that the debtor/Petitioner is entitled to exactly what he claimed as exempt. The Trustee has never asked the court to take

away any of the Petitioner's claimed exemptions. Rather, once the offer of settlement was presented to the court, through the Trustee's request to compromise the debtor's personal injury claim, the Trustee requested a hearing to determine what, if any, excess existed beyond the debtor's claimed exemptions. The excess would remain as property of the estate. After the hearing, the Bankruptcy Court found as a fact, *that no portion of the personal injury settlement was on payment for disability or out of payment and compensation for loss of future earnings. In re Mercer,* 158 B.R. at 889. This is a factual determination which the debtor has never raised on any level of appeal. *See Mercer v. Monzack,* 170 B.R. 759, 762 n. 16 (D.R.I. 1994); *Mercer v. Monzack,* 53 F.3d 1, 3 (1st Cir. 1995). The First Circuit Court of Appeals held that the case before it did not trigger the mandates of *Taylor.* The court reasoned that the Petitioner's personal injury claim by viture of his filing the voluntary Chapter 7 Petition became an asset of the estate and the only exception was to claim it as an exemption. Specifically, the court stated:

> That is, absent inclusion on a list of property that the debtor claims as exempt, *"property of the estate" is not exempted by operation of law under section 522(1), regardless whether a Rule 4003(b) objection was filed.*

Mercer v. Monzack, 53 F.3d 1 at 3.

The logical reasoning applied by the First Circuit Court of Appeals was as follows: It espoused the rule emanating from *Taylor* to be "absent a timely Rule 4003(b) objection, property of the estate plainly listed on Schedule B-4 *becomes exempt* by operation of law under section 533(1) *without regard to whether it is property of the kind entitled to exemption* under section 522(d)." *Id.*

Petitioner was attempting to argue that it was his intention to claim the entire proceeds of the settlement as exempt when he listed his exemptions as they appeared on Schedule B-4. The court noted that the Petitioner's Schedule B-4 plainly listed discrete statutory citations supporting the various exemption claims, *thereby restricting both the focus of the exemptions and the description of the particular right or interest in property of the estate to which the claims applied.*" *Id.* (Emphasis added). The court then reasoned, with the foregoing predicate, that the Bankruptcy Court "pursuant to its exclusive summary jurisdiction, *See, e.g., In re Stumpff,* 109 B.R. 1014, 1017 (Bankr. E.D. Okla.), it remained for the Bankruptcy Court to determine whether the disputed right or interest in property of the estate was listed on Schedule B-4." *Id.* The court recognized that the Trustee was not seeking to set aside any of the Petitioner's exemptions, contrary to the trustee's efforts in *Taylor.* If, in fact, the Bankruptcy Court determined that the personal injury settlement was, in fact, 100% compensation in disability, *Taylor* would apply and this matter would not be before you today.

There is no meaningful conflict between the decisions of the First and Seventh Circuits of sufficient importance to warrant this Court's review.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT CORRECTLY APPLIED *TAYLOR.*

This Court in *Taylor* saw the issue as:

> *We must decide in this case whether the* trustee may contest *the validity of an exemption after the thirty day period* if the

> debtor had no colorable basis for claiming the exemption.

Taylor, 112 S. Ct. 1646.

In the case that is now before the Court, Trustee is not contesting the validity of the exemptions claimed by the debtor. In *Taylor,* the debtor was claiming the entire proceeds from her lawsuit as exempt. In fact, the debtor and Trustee had several discussions pertaining to the value of the debtor's claim. The Trustee's continued belief that the claim was not worth what the debtor was asserting. The Trustee had never filed an objection to the claimed exemption. Once the case was settled and the debtor was awarded $110,000, the Trustee was seeking to object to the debtor's claim of an exemption for the entire proceeds. The Trustee in *Taylor* was put on notice that debtor was claiming more than she was entitled to and was trying to strike her claim of an exemption.

In stark contrast, the First Circuit correctly held that the Trustee was not put on notice that the debtor was claiming more than he was entitled and the Trustee was not seeking to strike any of the objections listed by the Petitioner. The Trustee was simply seeking to determine what, if any, proceeds exist in excess of the claimed exeemptions by the debtor, which proceeds would then remain property of the estate. *See In re Bronner* 135 B.R. 645 (9th Cir. BAP 1992). The First Circuit Court of Appeals correctly held that Monzack had not violated the requirements of *Taylor.*

III.

THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF RHODE ISLAND HAD THE AUTHORITY AND JURISDICTION IN SUPPORT OF ITS DECISION PURSUANT TO BANKRUPTCY CODE 105(a), 11 U.S.C. § 105(a).

This Court in *Taylor* left unanswered as to whether or not Bankruptcy Code 11 U.S.C. § 105(a) could provide the basis to affirm the Bankruptcy Court's decision. That provision states:

> The Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. *No provision of this title providing for the raising of an issue by a party and interest shall be construed to preclude the court from, sua sponte, taking any action* or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse or process.

11 U.S.C. § 105(a) (emphasis added). 11 U.S.C. § 105(a) permits courts to disallow exemptions not claimed in good faith. *See, e.g., Raggsdale v. Genesco, Inc.* 674 F.2d 277, 278 (4th Cir. 1982); *In Re: Staniforth*, 116 B.R. 127, 131 (W.D.W.B. 1990); *In Re: Budinsky*, 90 01099, 1991 WL 105640 (W.D. Pa. 6/10/91).

It is clear from the manner in which the debtors amended their bankruptcy schedules that the debtors did not claim their exemptions in good faith. The debtors repeatedly characterized the subject asset as a "Personal Injury Settlement." Yet they also repeatedly state that they may claim it as exempt in its entirety as a right to receive a disability benefit. This demonstrates an intent

to mislead and a lack of good faith by the debtors. This lack of good faith is repeatedly shown by the debtor's continuing insistence that because he calls the personal injury settlement a disability payment, then the Bankruptcy Court does not have the ability to consider any issues relating to the personal injury settlement with no evidence to support his allegation. When the United States District Court for the District of Rhode Island remanded the matter back to the Bankruptcy Court, Judge Votolato held a hearing to determine which portion of the $50,000 settlement was in fact related to a disability payment and/or loss of future earnings. The debtor provided no proof to the Bankruptcy Court that in fact any disability was causally related to his injury and consequently could not show that any of the proceeds represented compensation for disability or loss of future earnings. This provides an additional basis to affirm the First Circuit Court of Appeals' decision and to deny the Petition that is before you.

CONCLUSION

For all the foregoing reasons, Respondent Jason Monzack respectfully urges that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

CHRISTOPHER L. RUSSO
Counsel of Record
JASON MONZACK
KIRSHENBAUM &
KIRSHENBAUM
Attorneys for Respondent
888 Reservoir Avenue
Cranston, Rhode Island 02910
(401) 946-3200

(3)

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No. 95-970

In The

Supreme Court of the United States

October Term, 1995

ROBERT A. MERCER, JR.,

Petitioner,

v.

JASON MONZACK, ESQ.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF

ROBERT A. MERCER, JR.
Pro se
P.O. Box 6791
Providence, RI 02940
(401) 942-2167

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. The Split In Authority Between the First Circuit as to *Mercer v. Monzack*, 53 F.3d 1 and *Matter of Kazi*, 98 F.2d 318, 320 (7th Cir. 1993) Whereby the First Circuit Excuses Failure to Make a Timely Rule 4003(b) Objection Thereby Legitimizing the Lower Court's Proscribed Time-Barred Adjudication on Merit of Debtor Exemptions While the Seventh Circuit Strictly Prohibits Any Such Adjudication Where a Timely Rule 4003(b) Objection is Not Made – The Split in Authority is Clear

In his brief in opposition to petition for certiorari, respondent views the First Circuit opinion in *Mercer v. Monzack*, 53 F.3d 1 at 3 as constituting a waiver of Bankruptcy Rule 4003(b) by the debtor because debtor Mercer " . . . plainly listed discrete statutory citations supporting the various exemption claims, thereby restricting both the focus of the exemptions and the description of the particular right or interest in property of the estate to which the claims applied." Thus, in the First Circuit's and respondent's view contrary to *Taylor v. Freeland & Kronz*, 112 S.Ct. 1644 (1992) and ***without providing any legal authority*** respondent asserts that debtor/petitioner essentially waived his 11 USC 522(l) rights (operative because of respondent's failure to make a Rule 4003(b) objection) to exempt the entire settlement by granting the bankruptcy court authority to adjudicate on the merit of the indicated exemptions even though the seventh circuit in the *Matter of Kazi*, 98 F.2d 318, 320 (7th Cir. 1993) ruled "Failure to file a timely objection ***is an absolute bar*** to consideration of the merit of exemptions." (Emphasis added). Though it is clear *In Re Mercer*, 158 B.R. 886, 889 (Bkrtcy. D.R.I. 1993) that proscribed adjudication on the merit of debtor exemptions did occur, respondent argues that the bankruptcy court allocated the settlement, hitherto unallocated, and thus as such the intent of the settlement was

known and uncontested throughout the proceedings. This falsehood is the basis for respondent asserting that that debtor/petitioner ***intended*** to 100% exempt the settlement as contrasted with petitioner's claim that Debtor clearly ***did 100% exempt*** the settlement on the amended B-4 schedule (see Petition for Writ of Certiorari, page 4 – what Debtor did exempt is clear on amended B-4 petition). Respondent thus argues that what debtor intended to exempt was not part of the estate.[1] "After the hearing, the Bankruptcy Court found as fact, that no portion of the personal injury settlement was on payment for a disability or for loss of future earnings." (respondent opposition brief, page 8). Though respondent thus admits to the proscribed adjudication occurring, he infers the bankruptcy court adjudication as determining the intent of the unallocated sum when there is nothing to substantiate that *In Re Mercer, Id.* since the bankruptcy court simply evaluated the merit of exemptions and approved or denied them on that basis. The appeal courts, it was not the bankruptcy court, then assumed that if there was no

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[1] See *In Re Davis*, 118 B.R. 272, 276, ftn. # 3 (W.D.Pa. 1990, rvrs'd.), is Bankruptcy Court opinion in *Taylor*, how Debtor Davis's characterization of the principle exempted asset (an allocated sum) ultimately was determined to be, as Debtor Davis claimed because no rule 4003(b) objection was filed, as loss of future earnings ***despite*** the existent allocation that case conflicting with that characterization. In the instant case, Debtor Mercer was denied his characterization of the unallocated settlement being for disability or loss of future earnings where an unallocated sum did not contradict Mercer (as in *Taylor*) and no Rule 4003(b) objection to Mercer's assertion that the settlement was for those items.

basis for permanent disability the unallocated settlement was therefore not for permanent disability.[2]

Respondent argues that there is no split of authority between the First Circuit in *Mercer v. Monzack*, 53 F.3d 1, and *Matter of Kazi*, 98 F.2d 318 (7th Cir. 1993). Contrast the First Circuit's "facially valid" argument as excusatory basis for respondent not having to make a Rule 4003(b) objection along with the clear and apparent adjudication on merit of exemptions that occurred by the bankruptcy court with *Kazi's* strict prohibition where no rule 4003(b) objection is made, as in the instant case, to any such adjudication: "Failure to file a timely objection is an absolute bar to consideration of the merit of exemptions." *Id.* at 320. The First Circuit, for the first time at the appellate level, in the instant case now allows bankruptcy court jurisdiction to adjudicate and ultimately deny Debtor exemptions (where it is uncontested no Rule 4003(b) objection was made) past the Rule 4003(b) bar date excusing henceforth any failure to make a Rule 4003(b) objection. In the *Matter of Salzar*, 52 F.3d 708 (7th Cir. 1995) the Seventh Circuit recently reaffirmed the *Kazi* prohibition against any such adjudication. Can the split in authority between the First and Seventh Circuit be any more clear?

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[2] It is uncontested respondent/trustee failed to make a rule 4003(b) objection to debtor/petitioner's 100% exempt claim of the $50,000 insurance recovery within the thirty days allowed – "The trustee did not object to the debtor's claim of exempt property as the exemptions stated by the debtors are allowed by the bankruptcy code," appellee brief, USCA, page 6. The thirty day Rule 4003(b) bar date expired 9/26/91. The bankruptcy court opinion, *In Re Mercer*, 158 B.R. 886 (Bkrtcy. D.R.I. 1993), in which proscribed adjudication on merits of debtor exemptions irrefutably occurred resulting ultimately in denial of permanent disability exemption and loss of future earnings exemption was dated 9/16/93, nearly two years past the Rule 4003(b) bar date.

II. The Lower Courts and Respondent Cannot Sensibly Utilize Conclusions of the Bankruptcy Court Rendered 9/16/93 as to Proscribed Adjudication on Merit of Debtor Exemptions Two Years After the Rule 4003(b) Bar Date as Excusatory Basis for Failure Two Years Earlier to Make a Rule 4003(b) Objection – Trustee Clearly Could Not Have Known Then What He Knows Now as to Merit of Debtor Exemptions

With the knowledge available to trustee and the courts after proscribed adjudication on the merits occurs resulting in conclusions such as exemptions are meritless or, as found not to be permanently disabled, therefore disability claim not part of estate any party in interest can now skirt the Rule 4003(b) strict requirements retroactively, as in the instant case, by postulating that at the time of the thirty day Rule 4003(b) bar date expiration (9/26/91 the instant case) trustee did not object for reasons derived from bankruptcy court proscribed adjudication on merit of exemptions years later. Sensibly, it is extremely easy to see that Rule 4003(b) objection provisions never were intended to arm trustee retroactively with results of time barred merit hearings years later in postulating excusatory basis for failure to make same Rule 4003(b) objection. ***Trustee must make his Rule 4003(b) objection based solely on his perceived merit of exemptions during the time period dictated by bankruptcy law – only thirty days after exemption schedules are filed – not up to multiple years later.*** Any Court can retroactively with such time barred information years later provide the semblance of a reasonable excusatory basis for failure to make a Rule 4003(b) objection and the First Circuit and Respondent have followed that unfair course exactly in the instant case.

III. The Exemption Schedule Themselves Put The Trustee on Notice, No Other "Red Flag" is Currently Required by Bankruptcy Law Despite Respondent's and Lower Court's Rationale as to Any Such Inferred Requirement

Trustee/respondent use of the verbiage in his brief in opposition of *putting the trustee on notice* (page 7, respondent brief in opposition) is not tied, as it should be, to the B-3 and B-4 exemption schedules trustee is required to examine for perceived merit during the thirty day objection period but instead to some visceral "red flag" that trustee/respondent asserts without substantive legal authority to back the claim he believes the debtor is bound to wave in trustee's face whenever debtor has a significant exempt claim. Only when debtor has waved the red flag in the manner required by respondent is respondent, in his view, duty bound to make a Rule 4003(b) objection or, if no such objection is made, 11 USC 522(l) will take effect making whatever Debtor claimed as exempt is exempt. In *Taylor v. Freeland & Kronz*, 938 F.2d 420 at 425 (3rd Cir. 1991, affrm'd. S.Ct.) it is clear that the burden is not on Debtor to wave a red flag but on trustee to carefully examine the exemption schedules: " . . . Congress intended to shift the burden of objection from the debtor to other parties in interest." Trustee/respondent was remiss at carefully reviewing petitioner's schedules and even failed to ignore prior to the bar date petitioner's letter dated 7/25/91 advising trustee Debtor would be amending schedules to 100% exempt the then pending settlement (*See* appellant's Petition for Writ of Certiorari, page 3 – if a red flag is required clearly Debtor did with the 7/25/91 letter wave such a flag in trustee's face). The "red flag" argument critical to the lower courts

excusatory view of the otherwise strict Rule 4003(b) *Taylor* dictated objection requirements is based on the *Shoemaker* case – *Shoemaker,* 155 B.R. 552 (Bankr. N.D. Ala. 1992). It is the only case that flies in the face of *Taylor* in requiring Debtor to bear the burden of notice and conveying that notice to trustee that debtor when making a substantive exempt claim per the B-3 and B-4 exemption schedules ***that that in itself is not a red flag enough[3] to draw attention of trustee into making at Rule 4003(b) objection,*** trustee therefore, in not being required to object, reserving right to adjudicate indefinitely at a later date on that exempt claim. The First Circuit's view that petitioner's exemptions are " . . . facially valid . . . " *Id.* at 2, is their indication that the simple listing of exemptions even though they may reference the asset as being 100% exempt, "100% exempt" is not enough of a "red flag" and failure to make a Rule 4003(b) objection for the first time at the appellate level is excused, thereby removing virtually any responsibility of trustee to even examine the exemption schedules henceforth.

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[3] Something other than a perceived lack of merit for listed exemption, as respondent's argument goes, is required to call attention to trustee of the need for a potential Rule 4003(b) objection.

IV. Petitioner's Permanent Disability Claim for 100% of Settlement per 11 USC 522(d)(10)(C) was Ruled by Bankruptcy Judge Votolato Two Years After the Rule 4003(b) Bar Date to Not Be Part of The Bankruptcy Estate (i.e. – Therefore Debtor Ostensibly Cannot Make Such an Exempt Claim) Trustee is Obviated From Now Using that Court Conclusion as Excusatory Basis for His Failure to Make a Rule 4003(b) Objection Over Four Years Ago During the Thirty Day Rule 4003(b) Objection Period Ending 9/26/91

Respondent claims the wording in *Kazi* by debtor on schedules as to the exempt claim "if said property is property of the estate", *Id.* at 322, constitute his required red flag (the Rule 4003(b) objection in that case was also not made by trustee). By asserting that the conditional clause constitutes a red flag, respondent incorrectly draws a parallel between the *Kazi* case and the First Circuit in the instant case. The fact that the purported red flag in *Kazi* was not dispositive (and therefore inconsequential for purposes of respondent's argument) is aptly put by Judge Crabb, Chief District Judge (sitting by designation): "The time limitation in Rule 4003(b) relates to the list of exemptions claimed by the debtor rather than the substantive determination whether certain property is actually property of the estate." "The bankruptcy court held and the district court affirmed that the trustee had a duty to file objections to debtor's exemptions within the 30 days regardless whether such exemptions may be characterized as "conditional". We agree." *Id.* at 320. Sensibly, it would appear that petitioner's use of the "100%" under exempt amount column would be an adequate red flag though the accurate definition of such a warning flag remains smoked in obfuscation and mystery by the lower courts and respondent in the instant case who use the undefined term to their advantage.

In his statement of the case (brief in opposition) respondent " . . . contends that the Court of Appeals correctly held that the debtor did not properly list the entire personal injury proceeds so as to invoke the privileges that he would otherwise enjoy by virtue of the Trustee's failure to file a Rule 4003 objection." What, in respondent's view or in the view of the lower courts the instant case, ***does*** invoke Rule 4003(b), particularly in that case law strictly supports, other than the instant case to supplant Supreme Court precedent of *Taylor*, that ***no*** exceptions be made for failure to make a Rule 4003(b) objection?[4] (In *Kazi* the debtor's conditional " . . . if said property is property of the estate . . . ", *Id.* at 322, was ruled as not excusatory for the failure to make a Rule 4003(b) objection and is therefore not a legitimate red flag). The lower courts expediently view, for Rule 4003(b) objection purposes, whether the listed exemptions are correct in nomenclature only (*see* appellant Petition for Writ of Certiorari, page 10) ***without regard for the intended focus of Rule 4003(b) objection provisions being an evaluation by potential objector as to perceived merit of listed exemptions.*** Then the same courts proceed to deny same exemptions for lack of merit as if Rule 4003(b) and 11 USC 522(l) did not exist. Bankruptcy Judge Votolato's decision the instant case indicates that debtor is only entitled to that portion of the settlement attributed to each exemption to the extent that Debtor is ruled to be permanently disabled and has loss of earnings – the court found Debtor not permanently disabled and having no loss of future earnings. But, *Taylor* requires that the Court

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[4] "The statute and rule establish a strict procedure for objections to claimed exemptions. Their import is clear and they admit of no exception." *Taylor v. Freeland & Kronz*, 938 F.2d 420, 423 (3rd Cir. 1991, affrm'd. S.Ct.)

accept without adjudication as to the merit of Debtor/petitioner's exemption that he is disabled because of the Rule 4003(b) default, trustee forever barred from convening a Rule 4003(c) hearing to contest that claim. That is the privilege, to utilize respondent's use of the word albeit correctly, afforded petitioner by the failure of trustee to make a Rule 4003(b) objection in combination with Debtor controlling the unallocated sum as being for a permanent disability (or loss of future earnings) in the same manner as in *Taylor* Debtor Davis did (see above herein). Both these "privileges" flow directly from the respondent's failure to make a rule 4003(b) objection triggering 11 USC 522(l) as becoming operative granting Debtor as exempt whatever debtor claimed as exempt.

V. While Trustee Claims There Was Nothing to Object To as The Exemptions Claimed by Debtor Are Allowed by Law (Ignoring the Clear Intent of Rule 4003(b) Objection Provisions to Evaluate Perceived Merit of Debtor Exemptions) He Is Obviated By Such Rhetoric From Now Claiming Such Lawful Exemptions As Not in Good Faith

As an argument of last resort, respondent relies on 11 USC 105(a) that petitioner has not claimed exemptions in good faith so the court has authority on that basis to set aside the exemptions. Respondent is captive of his own rhetoric as having characterized Debtor exemptions as good faith as evidenced by respondent's statement. "The trustee did not object to the Debtors claim of exempt property as the exemptions claimed by the debtor ***are allowed by the bankruptcy code.***" (Emphasis added), appellee brief, USCA, page 6. Thus, as the exemptions are allowed by the code, they are good faith exemptions.

CONCLUSION

Petitioner respectfully requests that certiorari be granted as respondent and the lower courts have failed to provide a workable "bright line"[5] rule in the place of *Taylor, Taylor* effectively supplanted by the First Circuit. Even if one were to agree with the First Circuit's new law that Rule 4003(b) is nugatory along with 11 USC 522(l) except in limited undefined circumstances based on dynamic transitional and subjective terms like "facially valid" exemption claims (those not facially valid require a Rule 4003(b) objection, those that are facially valid do not require a Rule 4003(b) objection), it remains indeterminate as to what exempt claims are afforded 11 USC 522(l) protection when a party in interest fails to make a Rule 4003(b) objection. The acute need for finality and certainty in bankruptcy administration[6] has been depredated by the First Circuit while ambiguity and uncertainty prevails as to if a red flag is needed and, if so, what constitutes a proper red flag or facially valid exemption claim. Without this Court's review of *Mercer v. Monzack,* equitable and orderly administration of bankruptcy henceforth is an impossibility.

Respectfully submitted,

ROBERT A. MERCER, JR.
Pro se
P.O. Box 6791
Providence, RI 02940
(401) 942-2167

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[5] *Taylor v. Freeland & Kronz*, 938 F.2d 420, 424 (3rd Cir. 1991, affrm'd. S.Ct.)

[6] *Id.*, 425.